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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1959**

**No.** ~~100~~ 100

**THE ORDER OF RAILROAD TELEGRAPHERS,**  
**A VOLUNTARY ASSOCIATION, ET AL.,**  
*Petitioners,*

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY**  
**COMPANY, A CORPORATION,**  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE**  
**UNITED STATES COURT OF APPEALS FOR THE**  
**SEVENTH CIRCUIT.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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SEVENTH CIRCUIT.**

\_\_\_\_\_  
*To the Honorable, the Chief Justice of the United States  
and the Justices of the Supreme Court of the United  
States:*

The petitioners, The Order of Railroad Telegraphers,  
*et al.* (hereinafter "the Union"), respectfully show:

**JURISDICTION.**

The jurisdiction of this Court to entertain the petition  
for a writ of certiorari is based on 28 U. S. C. § 1254(1).

The judgment of the Court of Appeals for the Seventh  
Circuit was entered on 13 March 1959.

### OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, per Perry, J., is not reported. It may be found in the Appendix at pp. 165-71. The findings of fact and conclusions of law of the District Court appear in the Appendix at pp. 351-358. The opinion of the Court of Appeals is reported at 264 F. 2d 254. It also is reproduced in the Appendix filed with this petition.

### STATUTES AND RULES INVOLVED.

**Norris-LaGuardia Act, §§ 1, 4, 7, 8 and 13(c); 29 U. S. C. §§ 101, 104, 107, 108 and 113(c):**

#### Section 1. Norris-LaGuardia Act.

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U. S. C. § 101.

#### Section 4. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

“(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

“(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

“(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

“(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

“(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

“(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

“(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.” 29 U. S. C. § 104.

#### Section 7. Norris-LaGuardia Act.

“No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

“(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association,

or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

“(b) That substantial and irreparable injury to complainant’s property will follow;

“(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

“(d) That complainant has no adequate remedy at law; and

“(e) That the public officers charged with the duty to protect complainant’s property are unable or unwilling to furnish adequate protection.

“Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant’s property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant’s property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney’s fee) and expense of defense against the order or against the granting of any

injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity." 29 U. S. C. § 107.

Section 8 of the Norris-LaGuardia Act.

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

Section 13(c), Norris-LaGuardia Act.

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113(c).

**Railway Labor Act, §§ 2, First, 5, First and 6; 45 U. S. C.  
 §§ 152, First, 155, First and 156:**

**Section 2, First, of the Railway Labor Act.**

“First: It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.” 45 U. S. C. § 152, First.

**Section 5, First, of the Railway Labor Act:**

“The parties, or either party, to a dispute between an employee or group of employees, and a carrier may invoke the services of the Mediation Board in any of the following cases:

“(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

“(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

“The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

“In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." 45 U. S. C. § 155, First.

#### Section 6 of the Railway Labor Act.

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

#### Federal Rules of Civil Procedure, Rule 62(c):

"Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon

such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

### **STATEMENT.**

This case presents the question whether the laws of the United States, implemented by the injunctive powers of the federal courts, preclude railway labor unions from securing a voice through collective bargaining in the determination of how the fruits of increased productivity and the consequent burdens of technological unemployment are to be distributed between employers and employees. It arose out of the following facts.

On December 23, 1957, the Union, the certified collective bargaining agent pursuant to the Railway Labor Act for the station, telegraph, and tower employees of the Railroad (Finding 2, App. 351), served a notice pursuant to § 6 of the Railway Labor Act, 45 U. C. S. § 156, to amend the agreement between them by adding the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." (Finding 3, App. 352.)

The reason for the proposal was stated by the Union's President as follows:

"\* \* \* there has been a change in the management of the Chicago and North Western System. There had been a general slaughter of positions. I mean of jobs. There had also been a consolidation between Omaha and the North Western. Our organization had lost a number of jobs already.

"The incidents or occurrences that I have described extend to and affect all classes of employees represented by the Order of Railroad Telegraphers. Based on our membership survey, approximately one hundred positions had been eliminated other than in the station agent positions." (App. 120.)

The Railroad refused to confer on the subject of the § 6 notice. (Finding 4, App. 352.) The Railroad's intransigent position on this was revealed in the testimony at the trial by Mr. Heineman, Chairman of the Railroad:

"You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified nor in my opinion can it be." (App. 104.)

After the Railroad's refusal to discuss the proposed rule, the Union notified the Railroad that it was processing the § 6 notice pursuant to the terms of the Railway Labor Act. (Finding 5, App. 352-53.) On February 5, 1958, the Union made application for the mediation services of the National Mediation Board. (Finding 6, App. 353.) The Board docketed the case as Case No. A-5696. (Finding 7, App. 353.) But the mediator appointed by the Board was unable to persuade the Railroad to discuss the merits of the proposed rule and, on May 27, 1958, informed the parties that he had been unsuccessful in his efforts and suggested arbitration in accordance with the provisions of the Railway Labor Act. Both parties declined arbitration. (Finding 8, App. 353.) Mediation was terminated on June 16, 1958, and the file was closed on July 16, 1958. (App. 50-51, 333.)

Under date of July 10, 1958, the Union sought the views

of its membership on the question whether a strike should be authorized if necessary to seek a satisfactory settlement of the dispute arising from the proposal of the Union. (Finding 10, App. 354.) The vote in favor of the strike was almost unanimous. (*Ibid.*) No strike action was taken by the Union until after the thirty-day period following the termination of mediation had expired. On August 18, 1958, a strike call was issued to commence August 21, 1958. (Finding 11, App. 354.) On the day the strike call was issued, the Mediation Board proffered its services on an emergency basis. (Finding 12, App. 354-55.) Both sides accepted the proffer. (*Ibid.*) Case No. E-175, as it was docketed, proved equally futile and was closed by the Board on August 20th, 1958. (*Ibid.*)

After the service of the § 6 notice, the Railroad pressed proceedings before the Iowa and South Dakota regulatory commissions for permission to adopt its Central Agency Plan which called for the abolition of numerous station agent positions now held by members of the Union. Both commissions granted permission to institute the Railroad's plan for job abolition.\*

On August 20th, the Railroad instituted an action in the United States District Court for the Northern District of Illinois, asserting that it was entitled to an injunction against the proposed strike because the strike was illegal under the laws of the United States. (App. 4.) Since no diversity of citizenship exists between the parties, the Railroad's right to relief, if it has any, must depend on the fact that the laws of the United States give a right to injunction under the circumstances of this case.

On the day that the complaint was filed, the District

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\* The order of the South Dakota Commission, when first issued, purported to be mandatory in character. On denial of application for rehearing the Commission disclaimed any intention to interfere with the Railroad's obligations under the Railway Labor Act or its labor agreements. (App. 341-42.)

Court issued a preliminary restraining order enjoining defendants from striking until August 25, 1958. (App. 14-15.) From time to time this order was extended. (App. 15, 73-74, 74.) The District Court heard the evidence and arguments on the questions of a temporary and permanent injunction on August 25-27, 1958. (App. 1.) After the filing of briefs and further argument, the court rendered its opinion on September 5 and entered its findings of fact and conclusions of law and its decree on September 8, 1958. (App. 165-71; 351-58; 359.) The decree enjoined the strike until September 19, 1958, on the ground that this was the expiration of thirty days following the second Mediation Board effort. (Conclusion 5, App. 358.) In all other respects, it denied the relief sought by the Railroad and dismissed the complaint. On September 16, 1958, however, the District Court, on application of the Railroad, entered an order enjoining petitioners from striking until the disposition of the Railroad's appeal. (App. 371.) Both the Railroad and the Union appealed from the decree of the District Court. (App. 366; 360, 363, 372-73.)

Pending appeal in the Court of Appeals, the petitioners filed a petition for mandamus and a petition for certiorari before judgment in this Court, on the grounds, *inter alia*, that the Norris-LaGuardia Act prevented the issuance of the injunction pending appeal and that the Railway Labor Act does not require a second thirty-day moratorium on strikes. Both petitions were denied. 358 U. S. 916, 920 (1958).

On March 13, 1959, the Court of Appeals for the Seventh Circuit decided the appeals before it in this case: It held that the issue raised by the § 6 notice was not one "relating to rates of pay, rules and working conditions," thereby upsetting the trial court's finding as "clearly erroneous." 264 F. 2d at 260. From this false premise it reached a false conclusion, a conclusion which would be in error even

if the premise had been valid: that because the issue "is not within the scope of mandatory bargaining . . . the terms of the Norris-LaGuardia Act are here inapplicable." (*Ibid.*) It is from the judgment based on this opinion that the petition for certiorari is taken.

### **QUESTIONS PRESENTED.**

1. Whether the "laws of the United States", and more specifically the Railway Labor Act and the Interstate Commerce Act, make it illegal for a railway labor union to secure a voice through collective bargaining in the determination of how the fruits of increased productivity and the burdens of consequent technological unemployment are to be distributed between employers and employees, and warrant the interposition of the injunctive processes of the federal courts against a strike for such purposes.

2. Whether the Court of Appeals erred in holding that the contest between the Union and the Railroad, over the Union's demand to participate in the decision of what jobs which its members hold may be abolished, was not a "labor dispute" within the meaning of the Norris-LaGuardia Act.

3. Whether the Court of Appeals erred in holding that the contract change proposed by the Union did not relate to "rates of pay, rules and working conditions" as that phrase is used in the Railway Labor Act.

4. Whether the Court of Appeals erred in holding that the Norris-LaGuardia Act does not prohibit the issuance of a strike injunction where the employer has refused to comply with the terms of the Railway Labor Act.

5. Whether the Court of Appeals erred in holding that the right of the Union to demand changes in a contract, which changes related to "rates of pay, rules and working conditions", was limited by action of State regulatory commissions.

6. Whether the District Court had jurisdiction to entertain this suit in the absence of diversity of citizenship and in the absence of any question "arising under the Constitution or laws of the United States."

7. Whether the Court of Appeals erred in not reversing the District Court's holding that Rule 62(c) of the Federal Rules of Civil Procedure authorizes a federal court to issue an injunction against a strike despite the Norris-LaGuardia Act's prohibition against such an injunction.

8. Whether the Court of Appeals erred in not reversing the District Court's holding that the Railway Labor Act withdraws the right to strike for a second thirty day period following the failure of emergency mediation services.

#### **REASONS FOR GRANTING THE WRIT.**

1. The Court of Appeals has erroneously decided a question of federal law which has not been, but should be, decided by this Court, namely, whether federal law makes it illegal for a union to strike in order to compel an employer to bargain on an issue of job security. In so doing, the Court of Appeals has plainly misconstrued the Norris-LaGuardia Act and the Railway Labor Act in their application to issues of great importance not only to the parties but to the railroad unions and the railroads generally and to labor unions and employers generally. The practical effect of the decision below is to impede, if not nullify, collective bargaining of contract changes in the railroad industry. The contention of non-bargainability would become routine as to virtually all contract proposals other than those concerned with wages. Without a body of law establishing what is or is not bargainable, intervention of the federal courts by injunction would likewise be sought as a routine matter. The end result would be a breakdown of the administration of the Rail-

way Labor Act and a destruction of the peaceful processes developed thereunder.

2. The Court of Appeals has decided questions of federal law in a way which conflicts with the decisions of this Court in *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958); and *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

3. The Court of Appeals has erroneously sanctioned the District Court's improper exercise of jurisdiction over a suit which was based neither on diversity of citizenship nor on a question "arising under the Constitution or laws of the United States." In so doing, it erroneously decided a question which was specifically left open by this Court in *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 55 (1944).

4. The Court of Appeals has disposed of an important question of federal law which has not been, but should be, settled by this Court: namely, whether a federal court may, notwithstanding the provisions of the Norris-LaGuardia Act, enjoin a strike pending appeal from a final decree denying injunctive relief.

5. The Court of Appeals has disposed of an important question of federal law which has not been, but should be, settled by this Court: namely, whether the Railway Labor Act makes a strike unlawful for a period of thirty days following unsuccessful efforts at mediation by the National Mediation Board, and in particular whether a second successive period of thirty days during which a strike is unlawful follows the unsuccessful termination of further emergency efforts at mediation.

## I.

## **The Court of Appeals Has Rejected Long-Established Principles of Labor Law Formulated by Congress and This Court.**

This case presents a revival of the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed. It is hardly necessary to remind this Court of the importance of the national policy expressed in the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.* As early as 1914 Congress sought through the Clayton Act (29 U. S. C. § 52) to curb those abuses, which nevertheless continued. "In large part, dissatisfaction and resentment are caused \* \* \* by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction', characterized by the consequences of a criminal proceeding without its safeguards, has been challenged." Frankfurter & Greene, *The Labor Injunction* 200 (1930). In the words of the late Mr. Justice Brandeis, the labor injunction was not ordinarily sought "to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men." *Truax v. Corrigan*, 257 U. S. 312, 354, 368 (1921) (dissenting opinion). In 1932 Congress, in the Norris-LaGuardia Act, reaffirmed its policy against such abuse of the judicial process, this time with an effectiveness which has endured for a generation. Now, however, the Court

of Appeals for the Seventh Circuit, reading the Act with a narrow and hostile interpretation reminiscent of the decisions which emasculated the Clayton Act, declares that the federal courts must in a large and growing area of industrial conflict resume the role from which they were withdrawn by Congress, and must once again "take up the shock of our industrial warfare." Pepper, *Injunctions in Labor Disputes*, 49 A. B. A. Rep. 174, 179 (1924).

The Norris-LaGuardia Act provides: "No court of the United States \* \* \* shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute \* \* \*" (29 U. S. C. § 101), with exceptions not material here (*id.*, § 107). The definition of the term "labor dispute" is comprehensively broad: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment \* \* \*" (*id.*, § 113(c)). The dispute in this case arose when the Union, pursuant to the Railway Labor Act, gave notice of a proposal to change the terms of an existing collective bargaining agreement. The proposed change, if agreed to, would have required collective bargaining with respect to the abolition or discontinuance of existing positions. The dispute arose when the Railroad refused to bargain concerning the proposed change. It is evident that the proposed change in the agreement related to: (1) the length, or duration, of employment, and (2) the security of job tenure. Yet the Court of Appeals has held that the dispute was not one "concerning terms or conditions of employment."

The process of reasoning by which such a conclusion is reached must be a tortured one; and, indeed, the reasoning of the Court of Appeals is such as to make orderly

discussion difficult. The opinion of the court is a tangled skein of errors and prejudices. It reaches its startling conclusion by adopting a conception of the prerogatives of management as baronial as if collective bargaining had never been recognized; by repeatedly stigmatizing the Union's proposals to bargain as demands for a "veto" power; by treating the question whether the Norris-LaGuardia Act deprives the court of jurisdiction to issue an injunction as identical with the question whether the dispute was one within the terms of the Railway Labor Act; and by importing irrelevant and confusing concepts from the Labor Management Relations Act.

It is necessary to deal at the outset with some of these distracting matters. The entire course of the court's opinion is affected by the identification of the issue under the Norris-LaGuardia Act with that under the Railway Labor Act:

"Thus where a Section 6 Notice dealing with one of the enumerated subjects is given by a union to a carrier, a 'labor dispute' within the meaning of the Norris-LaGuardia Act has arisen. Conversely, where the Section 6 Notice does not pertain to 'rates of pay, rules, or working conditions', there is no 'labor dispute', and the provisions of the Norris-LaGuardia Act with reference to injunctions are not applicable." 264 F. 2d at 258.

The present case concerns a labor dispute, relating to "terms or conditions of employment" within the Norris-LaGuardia Act. It is also a dispute pertaining to "rates of pay, rules, or working conditions", within the Railway Labor Act. It is not true, however, that coverage by the Railway Labor Act is a prerequisite to the applicability of Norris-LaGuardia's proscription of the injunctive remedy. We do not believe that there is a significant difference between the coverage of the two acts, except as this Court has established a difference in *Trainmen v. Chicago River*

*Indianapolis R. Co.*, 353 U. S. 30, 40 (1957). By assuming identity of coverage, however, and by gratuitously engrafting upon the Railway Labor Act a concept of disputes not within the area in which the parties are under the statutory duty to bargain, the Court of Appeals paved the way for its conclusion that the dispute involved here was not within the coverage of either act.

The concept of a dispute not within the scope of the duty to bargain was borrowed from the Labor Management Relations Act. For its proposition that the dispute here was "not within the scope of mandatory bargaining", and hence not within the provisions of Norris-LaGuardia, the court cited *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958). There an employer insisted, as a condition of entering into a collective-bargaining agreement, upon the inclusion of (1) a "ballot" clause calling for a pre-strike secret vote of employees, union and nonunion, and (2) a "recognition" clause which excluded, as a party to the contract, the international union which was the certified representative. The Board held that both these clauses related to matters outside the scope of mandatory collective bargaining as defined in section 8(d) of the Labor Management Relations Act (referring to "wages, hours, and other terms and conditions of employment"), and that the employer's insistence upon their inclusion as the price of agreement on any contract was an unfair labor practice. This Court affirmed, four Justices disagreeing as to the "ballot" clause.

As this Court has had occasion to note, "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act . . ." *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 31-32, n. 2 (1957).

The term "unfair labor practice" is not used in the Railway Labor Act. That Act establishes no such agency as the National Labor Relations Board, empowered to determine what constitutes an unfair labor practice and hence, under this Court's decision in the *Borg-Warner* case, to exercise a degree of control over the issues which are thought to be appropriate subjects for bargaining. By its decision below the Court of Appeals has in effect read a provision concerning unfair labor practices into the Railway Labor Act, and has set itself up as the agency to determine what are and what are not appropriate subjects of bargaining. In so doing, it has announced that its own determinations of that question are controlling with respect to the scope of the protection which the Norris-LaGuardia Act provides against government by injunction.

The *Borg-Warner* case sharply divided the members of this Court. Referring to the phrase "other terms and conditions of employment," Mr. Justice Harlan said in his separate opinion: "The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation." *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 351, 353 (1958). In his view the Board "was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies" of the Wagner and Taft-Hartley Acts. We are not concerned here with the correctness of that decision. We are vitally concerned, however, with the fact that this Court's decision of a close question under the Labor Management Relations Act has been misapplied to a dispute under the Railway Labor Act with no justification whatever and in such a way as to aggravate the unfortunate consequences which Mr. Justice Harlan anticipated.

The Court of Appeals has misinterpreted the *Borg-Warner* case in such a way as to produce consequences in

the railway labor field which were of a certainty not intended by those who joined in the majority opinion in *Borg-Warner* in the more general field of labor relations to which the decision relates. This Court held only that the matters covered by the "ballot" and "recognition" clauses were not within the scope of the duty to bargain imposed by the Labor Management Relations Act; it did not hold that bargaining with respect to those matters was forbidden. "As to [matters not within the scope of mandatory bargaining], however, each party is free to bargain or not to bargain \* \* \*." (356 U. S. at 349.) "Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions." (*Ibid.*) The fault of the employer was a narrowly defined one: he might permissibly propose these clauses and bargain over them; his sole fault was in refusing to agree to any contract not containing them. It was this refusal which was construed as a refusal to bargain on matters within the scope of mandatory bargaining. Without such a refusal, the employer would have been free to back his bargaining over the same clauses with his economic power. Without it, if a strike had resulted from failure to agree upon one or the other of the clauses the Norris-LaGuardia Act would have prohibited injunction; there is not the slightest intimation in *Borg-Warner* to the contrary.

Yet the Court of Appeals holds that the mere proposal by the Union of a clause relating to job tenure, followed by recourse to its collective bargaining position upon the refusal of the Railroad to bargain on the question, deprives the Union of the protection of the Norris-LaGuardia Act. Let us assume for the moment—of course without conceding—(1) that by implication the Railway Labor Act contains some analogue of the Labor Management Relations Act's concept of "unfair labor practices," of which a refusal to bargain on matters within the scope of "mandatory col-

lective bargaining" is one; and (2) that the proposal relating to discontinuance of positions contained in the Union's Section 6 notice was not within the range of subjects with respect to which bargaining was mandatory. The Union was nevertheless free to make the proposal. There was in existence a collective bargaining agreement between the parties unquestionably relating to matters within the scope of mandatory bargaining, none of which were involved in the proposal. The Union was not in the position of refusing to bargain on "mandatory" issues unless and until agreement should be reached on this "non-mandatory" one; only the issue of job abolition was involved. On the hypotheses stated, each party was free to bargain on the proposal or not, and to enforce its position by recourse to economic resources—in the employment of which the Union would be protected against injunction by the Norris-LaGuardia Act. Yet the Court of Appeals says:

"Accordingly, the issue here is whether the Union's demand falls within the scope of mandatory bargaining. If it does not, the injunction may and should issue." 264 F. 2d at 258.

Much of the error and confusion of the opinion is reflected in this curt and elliptical passage. In it the Court of Appeals decrees, in effect, that by making a proposal which it was perfectly free to make even under the *Borg-Warner* doctrine, and in resorting to the right to strike in order to induce the Railroad to bargain over the proposal, the Union was somehow guilty of an "unfair labor practice" (not described by the Railway Labor Act), and that the penalty—not prescribed by any law—for this practice is exclusion from the protection of Norris-LaGuardia.

The most alarming and least excusable aspect of this error is the presumptuous judicial curtailment of the national policy stated in the Norris-LaGuardia Act—a curtailment which finds not a trace of justification in the *Borg-*

*Warner* case. That dealt only with unfair labor practice under the Labor Management Relations Act and did not involve injunctions or the Norris-LaGuardia Act in any way. Moreover, the Labor Management Relations Act's concept of "unfair labor practice" and the concomitant distinction between "mandatory" and "permissible" subjects of bargaining have no place in the different plan devised by Congress to regulate railway labor disputes. Under the Railway Labor Act it is "the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle *all disputes*, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce . . ." Section 2, First. (Emphasis supplied.) Such comprehensive language leaves no room for a sector in which the parties are "free to bargain or not to bargain." 356 U. S. at 349. Either the subject of the proposal is one on which agreement would be unlawful, or it is one with respect to which bargaining is mandatory. In the Railway Labor Act, Congress has comprehensively required resort to collective bargaining on all lawful proposals as a means of avoiding work stoppages; it has established no agency with power to determine that there are some matters with respect to which bargaining is mandatory and some with respect to which it is merely permissible. In the judgment of Congress, in this field collective bargaining is so vital that it is obligatory as to all matters which may lawfully be the subject of agreement.

The refusal of the Court of Appeals to recognize the duty of the Railroad to bargain is based upon (1) repeated characterizations of the Union proposal as a demand for "veto" power; (2) unsupported assertions that the discontinuance of positions is an inviolable prerogative of management; and (3) reliance on cases which deal with proposals with

respect to which agreement would be illegal or immoral, and which therefore have no bearing on the proposal of the Union in this case.

In the course of its relatively brief discussion of the legal problem presented, the court refers to the Union proposal no less than four times as a demand for "veto" power (264 F. 2d at 258, 259), and in still another place says that "the Union's proposal, if accepted, would place in its hands the power to prevent any undertaking by North Western to meet competition by modernizing its operations in the light of technological development \* \* \* ." (*Id.* at 258.) Such language is significant less for its intemperance than for its refusal to recognize or understand the process of collective bargaining which is the cornerstone of national labor policy. The Union did not and could not "demand" a "veto" power. Under the Railway Labor Act the Railroad is not required to agree to any proposal to amend the agreement. It is only required to bargain. The Union asked that it bargain over a proposed change in the contract. The proposed change, if agreed to, would have had no self-executing effect with reference to the abolition or continuance of jobs; by its own terms it would have required further bargaining with reference to any specific plan for job abolition. Had the Railroad, in compliance with its duty under the Act, bargained over the proposal, and had there been failure to reach agreement, the machinery provided by the Act would have gone into operation as to the merits of the proposal: mediation and conciliation, possible arbitration, and finally possible recommendations by an emergency board appointed at the discretion of the President. This is the process of free collective bargaining; this is not a context in which either party is in position to "demand" a "veto."

The court's determined obliviousness to the true character of the proposal suggests that the court assumed (1) that

the Union would at no stage of the bargaining process agree to a modification of the proposal, (2) that if a strike should occur because of the failure to reach agreement on the proposal the Railroad would lose the strike and have no alternative except to agree, and (3) that, if the proposal should become part of the collective bargaining agreement, the Union would never agree to the abolition of any existing positions. Perhaps the court assumed that the Railroad has no bargaining power. Since, however, the entire history of collective bargaining shows that original demands are almost invariably altered in the bargaining process, it is more likely that the court was simply unwilling to concede to the Union the right which Congress has given it—the right to have a voice in decisions affecting job tenure and measures to stabilize employment. The influence which the Union exerts on such matters through the process of collective bargaining is in no sense a veto, and to refer to it as such is to exhibit lack of understanding of, or hostility to, that process itself.

Closely related to this stigmatizing of the Union's proposal are the repeated references by the court to the question covered by the proposal as a managerial prerogative. The court speaks of "the right to manage and control the administrative functions of its business enterprise" (264 F. 2d at 258); of the "attempt by the Union to arrogate to itself the prerogatives that have been traditionally and rightfully management's" (*Ibid.*); and of an attempt to "usurp legitimate managerial prerogative." (*Id.* at 259.) These unsupported aspersions are significant less for their betrayal of the court's bias than for their demonstration of the court's indifference to the history and function of collective bargaining as an instrument of national labor policy. Practically all the subjects of modern collective bargaining were once regarded as matters within the managerial prerogative. The essence of collective bargaining

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,  
*Petitioners*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,  
*Respondent*

On Petition for a Writ of Certiorari to the United States Court of  
Appeals for the Seventh Circuit

**MOTION OF RAILWAY LABOR EXECUTIVES' ASSO-  
CIATION FOR LEAVE TO FILE A BRIEF  
AS AMICUS CURIAE IN SUPPORT  
OF PETITION, AND BRIEF**

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June, 1959

is that matters once decided unilaterally shall be determined bilaterally. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 353, 358 (1958). (Separate opinion.) The basic question in the case, the merits of which were not really considered by the Court of Appeals, is whether the employment problems which are precipitated by technological advance are to be decided arbitrarily and unilaterally by virtue of the "prerogative" of management, or are to be decided cooperatively in accordance with Congressional design through the collective bargaining process.

In concluding this portion of the discussion we must once again emphasize that, even if the court below were not so egregiously in error in its interpretation of the Railway Labor Act, it would still be fatally wrong in its conclusion that Norris-LaGuardia does not apply. For even if the subject covered by the Section 6 notice is not one with reference to which the Railroad has a statutory duty to bargain, the effect is only to bring back into effect the conditions which existed before regulation of labor-management relations imposed the duty to bargain. There would still be the right to propose subjects of agreement; there would still be the right to strike; there would still be the Norris-LaGuardia Act's prohibition against the use of the injunction against strikes. The notion that the scope of the Norris-LaGuardia Act's limitation of federal court jurisdiction is narrowed by the scope of "mandatory" collective bargaining under the Railway Labor Act—even if there is assumed to be a limit on the scope of that duty to bargain—is a figment of the court's imagination.

## II.

**The Court of Appeals Erred in Holding That the Case Is Not One Involving or Growing Out of a Labor Dispute, and in Directing a Permanent Injunction in Spite of the Norris-LaGuardia Act.**

This Court has held that the Norris-LaGuardia Act does not preclude injunction in three situations involving railway labor:

(1) Where the dispute is a "minor" one under the Railway Labor Act—i.e., a dispute concerning the application or interpretation, as distinguished from the negotiation of, provisions of a collective bargaining agreement. For such disputes the Act provides compulsory arbitration on the initiative of either party, and the Norris-LaGuardia Act has been held inapplicable to disputes pending before the Railroad Adjustment Board. *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

(2) Where the activity enjoined is in itself illegal, e.g., where the union and the employer have agreed to discriminate against certain employees solely on racial grounds. *Trainmen v. Howard*, 343 U. S. 768 (1952).

(3) Where injunctive relief is necessary to compel compliance with positive mandates of the Railway Labor Act. *Virginian R. Co. v. System Federation*, 300 U. S. 515 (1937).

The Court of Appeals did not rely on the principle that a strike may be enjoined if it arises out of a minor dispute with respect to which the Act provides for compulsory arbitration. It could hardly have done so, since this case clearly involves a major rather than a minor dispute: i.e., a dispute relating to the negotiation of contract terms, not to their interpretation or application. Instead it cited and relied upon the racial discrimination cases, which clearly do not support its decision, and upon a decision by the

Court of Appeals for the Sixth Circuit which is clearly distinguishable from the case at bar.

In the *Howard* case, *supra*, the carrier and the union had entered into an agreement which had the effect of causing the railroad to discharge Negro "train porters" who had been performing the duties of brakemen. At the suit of one of the Negro "train porters" against whom this agreement was directed, this Court held that Norris-LaGuardia did not deprive the courts of power to enjoin the execution of the agreement. This Court said: " \* \* \* Discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." 343 U. S. at 773. In unqualified terms the Court stamped the agreement as "unlawful" (343 U. S. at 774)—a term which by no stretch of the imagination can be applied to the agreement proposed by the Union in this case. The *Borg-Warner* case, on which the Court of Appeals relied so heavily, held only that certain subjects were not within the scope of mandatory bargaining under the Labor Management Relations Act; it specifically recognized the legality of the proposed agreements and the freedom of the parties to propose and negotiate them. The only shadow of a basis for the suggestion that the proposed agreement in this case was "unlawful" relates not to federal law—to the purposes for which the Railway Labor Act sanctioned the use of economic power—but to the Court of Appeals' wholly indefensible notion that the rights of the parties under the Railway Labor Act must be subordinated to the permissive orders of State regulatory commissions. Yet the Court of Appeals says: "We see no material difference between the *Howard* case and the case before us." 264 F. 2d at 259. There are none so blind as those who will not see.

Since the agreement proposed by the Union's Section 6

notice would have been a perfectly lawful one, the Court of Appeals' decision that the Norris-LaGuardia Act does not apply can be supported only by the notion that what is here involved is not a labor dispute within the meaning of that Act. But the very line of cases on which the Court of Appeals relies establishes with complete clarity that Norris-LaGuardia was held inapplicable *not* because there was no labor dispute but because the activity enjoined was outlawed by federal law and policy. In *Graham v. Brotherhood of Firemen*, 338 U. S. 232 (1949), another of the racial discrimination cases cited and relied on by the Court of Appeals, this Court said:

"In *Virginian R. Co. v. System Federation*, 300 U. S. 515, we held that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act . . . enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-LaGuardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.' . . .

"But the Brotherhood urges that the controversy in the *Virginian* case did not involve a labor dispute within the meaning of the Norris-LaGuardia Act and that accordingly that case must be distinguished on its facts. The Act defines a 'labor dispute' to include 'any controversy concerning terms or conditions of employment, or concerning the *association or representation of persons* in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. . . . ' 29 U. S. C. § 113(c). . . . We do not accept the Brotherhood's invitation to narrow the meaning of that term. The purpose of

the Act would be violated and the scope of its protection limited were it to be construed as not extending to efforts of a duly certified bargaining agent to obtain recognition by an employer. Moreover, if this Court had considered that a labor dispute was not involved, it would hardly have taken the trouble, in the *Virginian* case, to refute contentions based upon parts of the Act, which as a whole extends its protection solely to such disputes." 338 U. S. at 237-38. (Emphasis in the original.)

In short, this Court has *never* held the Norris-LaGuardia Act inapplicable in a railway labor situation on the ground that the case was not one involving or growing out of a labor dispute within the meaning of that Act. It has only held that injunctions are available: (1) to require adherence to the Railway Labor Act's procedure for compulsory arbitration of minor labor disputes; (2) to prevent the execution of agreements which discriminate solely on grounds of race and are therefore inconsistent with the policy of the Railway Labor Act and unlawful; and (3) to vindicate rights positively conferred by the Railway Labor Act.

The other case relied on by the Court of Appeals is the decision of the Sixth Circuit in *Brotherhood of Railway Trainmen v. New York Cent. R. Co.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied 355 U. S. 877. There the strike was regarded by the court as a mere protest by the union against a managerial decision to close a certain yard, there being no relevant provision in the collective-bargaining agreement. There was no proposal for a new contract, or contract term. There was no Section 6 notice. There was no history, as here, of a consistent refusal by the railroad to bargain over a properly filed Section 6 notice. There was no existing controversy with regard to reallocation of jobs. Here approximately one hundred positions other than station agent positions had been abolished and

many more were threatened. In the *New York Central* case the National Mediation Board found that it had no jurisdiction; here the Board took jurisdiction and exhausted the mediation provisions of the Act, even intervening a second time on its own motion.

### III.

**The Court of Appeals Erred in Ordering an Injunction Notwithstanding the Provision of Section 8 of the Norris-LaGuardia Act, Which Precludes Injunctive Relief to Any Complainant Who Has Failed to Comply With Obligations Imposed by Law and to Make Reasonable Efforts to Settle the Dispute.**

The record in this case plainly shows that the Railroad persistently and intransigently refused to discuss the contract change proposed in the Union Section 6 notice. Section 8 of the Norris-LaGuardia Act and Section 2, First, of the Railway Labor Act are set out above at pp. 5 and 6.

Section 8 prohibits the injunction. The proposal of the Union was made in good faith. That there was a genuine dispute there can be no doubt. If it should be ultimately and authoritatively determined that the issue was not a bargainable one under the Railway Labor Act, certainly it cannot be said that on that question there was not room for a reasonable difference of opinion. Yet the response of the Railroad to the serious problem tendered in good faith by the Union's Section 6 notice was one of obdurate refusal to discuss the matter in order to avert what the Railroad itself characterizes as a major interruption of commerce. This obduracy and this refusal to participate in any way in the processes prescribed by the Railway Labor Act for the settlement of disputes disqualifies the Railroad as an applicant for injunctive relief. *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

## IV.

**The Court of Appeals Erred in Holding That the Section 6 Notice Did Not Relate to Matters of "Rates of Pay, Rules and Working Conditions" as Those Terms Are Used in the Railway Labor Act.**

The Court of Appeals ordered the issuance of the injunction in this case on the ground that the § 6 notice did not relate to "rates of pay, rules and working conditions" as those words are used in the Railway Labor Act. Section 2, First, 45 U. S. C. § 152, First. The speciousness of its conclusion has already been demonstrated in Part I of this brief. It is proposed here to point out only that the Court of Appeals was in error with regard to its premise as well as its conclusion.

The argument of the Court of Appeals is not dissimilar to that rejected by the 10th Circuit. In *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 53 (C. A. 10, 1956), cert. denied 351 U. S. 918 (1956), it was "contended that compulsory retirement of railroad workers is not a proper subject for collective bargaining under the Railway Labor Act. \* \* \*" The Court held, in accord with *Inland Steel Corp. v. N. L. R. B.*, 170 F. 2d 247 (C. A. 7, 1948), and *Lamon v. Georgia Southern & Florida Ry. Co.*, 212 Ga. 63, 90 S. E. 2d 658 (1955), that compulsory retirement was a proper subject for bargaining. It properly stated: "The Act is remedial and should be broadly and liberally construed \* \* \*." 229 F. 2d at 55. And as this Court noted in the *Borg-Warner* case: "Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. *E. g.*, *Labor Board v. J. H. Allison & Co.*, 165 F. 2d 766 (merit increases). \* \* \* Provisions which two decades ago might have been thought to be the exclusive concern of

labor or management are today commonplace in such agreements." 356 U. S. at 353, 358.

On this subject, however, history is even more persuasive than logic. "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346 (1944). And the history of the railroad industry demonstrates conclusively that the subject of the § 6 notice in this case has consistently been dealt with as an appropriate subject for bargaining under the Railway Labor Act.

Collective bargaining as to the length, or term of employment is commonplace. There are a variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the Union are in existence on at least two railroads. (Find. 17, App. 356-357.)\*

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\* In making this finding of fact the District Court in addition to considering the evidence on this issue took judicial notice of the great extent of collective bargaining in this field. Provisions relating to length and duration of employment, dismissal and discharge, job rights in a craft, departmental and plant-wide basis, seniority as a controlling criterion in hiring, promotion, demotion, transfer and lay-offs are standard in collective bargaining agreements throughout the country, including the railroad industry. "The negotiation of guarantees of pay or work represents a major area of concern in collective bargaining today. Contracts containing such guarantees amount to about 13 per cent of a balanced random sample of 400, but their coverage extends to two-and-a-half million workers." 2 Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts (BNA), 53:1 (2-22-57). "Roughly a seventh of union agreements grant employees leaving the company separation pay \* \* \*." *Ibid.* 40:361 (4-5-57). Many

The Railroad recognized that stabilization of employment was a bargainable subject by its participation in the National Agreement of 1956. That agreement specifically excepts from the operation of a three-year moratorium on certain specified Section 6 notices, notices dealing with stabilization of employment and separation allowances. It expressly provides for the serving of such notices and negotiation of agreements concerning them. (National Agreement, November 1, 1956, Article VI(e), App. 269.) The Railroad further recognized the bargainability of the same subject by negotiating and entering into agreements with most of the non-operating Brotherhoods on its property, not including the Union, for severance pay allowances upon the discontinuance of positions. Severance pay is one method of stabilizing the employee's situation pending his finding another job. The severance pay tides him over during the period of unemployment following discontinuance of position, and discourages dismissals thereby stabilizing employment. The Railroad further recognized the negotiability of the whole subject of stabilization of employment by insisting upon and having incorporated into the severance pay agreement a three-year moratorium prohibiting service of 30 days' notice relating to "stabilization of employment, separation allowance or other similar requests or demands", for all the Brotherhoods signatory to the agreement (Pl. Ex. 13, App. 308).

The fact that the National Agreement of 1956 mentions separately notices concerning separation allowances and notices concerning stabilization of employment indicates that the Carriers signatory to the agreement, including the

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such agreements provide for payment of separation pay for job or plant discontinuance. *Ibid.* 40:362-366 (4-5-57). Limitations on the right to dismiss employees no longer needed because of technological changes are also found in collective agreements. *Ibid.* 65:121 ff. (6-15-56). See also 1 Werne, *Law and Practice of the Labor Contract* 72 ff. (1957).

Railroad, recognized that notices could be served making demands going beyond ordinary separation allowances. (National Agreement, November 1, 1956, Article VI(e), App. 269.) See National Mediation Board Interpretations 72, 72-A, 72-B (January 14, 1959).

The present collective agreements between the Railroad and the Union contain many standard provisions concerning job security. These include the so-called scope rules which give the Telegrapher's craft exclusive right to perform certain designated work, and extensive seniority provisions. The close relationship between seniority and stabilization of employment was recognized even by the Seventh Circuit in *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247, 252 (C. A. 7, 1948) as follows:

"Among the purposes which seniority serves is the protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge, and the creation of job security for older workers."

## V.

### **The Court of Appeals Erred in Holding That State Regulatory Commissions Can Relieve the Railroad of Its Obligations Under the Railway Labor Act.**

Having secured permission from the regulatory commissions of Iowa and South Dakota to abolish a large number of jobs held by union members, after the § 6 notice had been served upon it, the Railroad successfully urged on the Court of Appeals the proposition that the commission orders relieved it of the obligation imposed upon it by the Railway Labor Act to bargain with the Union over matters relating to "rates of pay, rules and working conditions." The Court of Appeals held that: "The Commission orders may not be circumvented by a

contract entered into by a carrier and a union under threat of strike." 264 F. 2d at 259.

The patent error of the argument and the holding is evident, first, because the commission orders were permissive rather than mandatory, i.e., they authorized the Railroad to abolish the positions which it had sought permission to abolish but did not require them to do so in conflict with its obligations under the Railway Labor Act.\* Second, the error is predicated on the rejection of the proposition that the Supremacy Clause of the Constitution requires the State commissions to subordinate their rules to the mandates of Congressional legislation. The consequences of the Court of Appeals ruling would subject all collective bargaining contracts to the control of state agencies. But as this Court said in *California v. Taylor*, 353 U. S. 553, 561 (1957): "Under the Railway Labor Act, not only would the employees \* \* \* have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement \* \* \* would take precedence over conflicting provisions of the state \* \* \* laws."

## VI.

**The District Court Was Without Jurisdiction to Entertain This Suit Since There Was No Diversity of Citizenship Between the Parties and No Question "Arising Under the Constitution or Laws of the United States" Was Presented.**

Since the Railroad's principal place of business is located in Illinois (App. 5) and the individual petitioners are citizens of Illinois (*ibid.*), jurisdiction cannot be rested on § 1332 of the Judicial Code, as amended July 25, 1958, prior to the filing of this action.

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\* See footnote on p. 10, *supra*.

No jurisdiction can be predicated upon § 1331 of the Judicial Code for the reasons stated by Mr. Justice Rutledge in this language: "the cause of action is one merely for the exercise of the general police power in the protection of the railroad's property. The complaint \* \* \* does not specify any provision of the federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act [and the Railway Labor Act] \* \* \* cf. *Cohens v. Virginia*, 6 Wheat. 264; *Norton v. Whiteside*, 239 U. S. 144; *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Gully v. First National Bank*, 299 U. S. 109." *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 54-55, n. 5 (1944).

The issue, as thus put by Mr. Justice Rutledge, was specifically left undecided by the Court in the *Toledo* case. *Id.* at 55. We respectfully urge that it calls for a decision by this Court in the instant case.

## VII.

**The Court of Appeals Erred in Not Reversing the District Court's Holding That Rule 62(c) of the Federal Rules of Civil Procedure Permits the Issuance of an Injunction Pending Appeal Where the Norris-LaGuardia Act Prohibits the Issuance of an Injunction and the Holding That the Railway Labor Act Withdraws the Right to Strike for a Second Thirty Day Period Following the Failure of Emergency Mediation Services.**

The Court of Appeals purported to dispose of all of the issues raised by the petitioners and respondents on their respective appeals to that court. 264 F. 2d at 256. It thus ruled adversely on petitioners' contentions (1) that Rule 62(c) of the Federal Rules of Civil Procedure cannot authorize the issuance of an injunction pending appeal

where the Norris-LaGuardia Act prohibits the issuance of an injunction; and (2) that the Railway Labor Act does not withdraw the right to strike for a second thirty-day period following the failure of emergency mediation services.

We concede that if the Court of Appeals had been right in its conclusion that a permanent injunction against the strike was not precluded by the Norris-LaGuardia Act, there would be no need to reach these questions. Inasmuch as the Court of Appeals' judgment on the permanent injunction was clearly erroneous, however, it follows that these additional questions, which were raised by the petitioners in their petition for certiorari before judgment, should be decided.

### CONCLUSION.

For the reasons heretofore set out, petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Seventh Circuit and reverse the judgment of that court.

Respectfully submitted,

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Dated June 8, 1959.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

No. \_\_\_\_\_

THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,  
*Petitioners*

v.

CHICAGO AND NORTH-WESTERN RAILWAY COMPANY,  
*Respondent*

On Petition for a Writ of Certiorari to the United States Court of  
Appeals for the Seventh Circuit

**MOTION OF RAILWAY LABOR EXECUTIVES' ASSO-  
CIATION FOR LEAVE TO FILE A BRIEF  
AS AMICUS CURIAE IN SUPPORT  
OF PETITION**

The Railway Labor Executives' Association hereby respectfully moves the Court for leave to file the annexed brief *amicus curiae* in support of the petition for certiorari filed in this case by The Order of Railroad Telegraphers, et al. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but refused.

I

The Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., with which are affiliated twenty-three

standard national and international railroad labor organizations that are the duly authorized representatives of more than 90% of the nation's rail employees under the Railway Labor Act. (45 U.S.C.A. 151 et seq.) The names of these individual organizations are:

American Railway Supervisors' Association  
 American Train Dispatchers' Association  
 Brotherhood of Locomotive Engineers  
 Brotherhood of Locomotive Firemen and  
 Enginemen  
 Brotherhood of Maintenance of Way Employes  
 Brotherhood of Railroad Signalmen  
 Brotherhood of Railroad Trainmen  
 Brotherhood Railway Carmen of America  
 Brotherhood of Railway and Steamship Clerks,  
 Freight Handlers, Express and Station  
 Employees  
 Brotherhood of Sleeping Car Porters  
 Hotel & Restaurant Employees and Bartenders  
 International Union  
 International Association of Machinists.  
 International Brotherhood of Boilermakers, Iron  
 Ship Builders, Blacksmiths, Forgers and  
 Helpers  
 International Brotherhood of Electrical Workers  
 International Brotherhood of Firemen & Oilers  
 International Organization Masters, Mates &  
 Pilots of America  
 National Marine Engineers' Beneficial Association  
 Order of Railway Conductors and Brakemen  
 Railroad Yardmasters of America  
 Railway Employees' Department, AFL-CIO  
 Sheet Metal Workers' International Association  
 Switchmen's Union of North America  
 The Order of Railroad Telegraphers

This Court has heretofore recognized the Association as a proper party to appear and speak for these organizations and their member employees. *Interstate Com-*

*merce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al. v. United States*, 355 U.S. 141 (1957).

## II

The Association and the individual organizations of which it is composed have a substantial interest in the petition for certiorari filed by The Order of Railroad Telegraphers because the decision of the Court of Appeals for which review is sought by that petition, if left standing, will seriously restrict collective bargaining under the Railway Labor Act and will leave the employees represented by the organizations affiliated with the Association at the mercy of their railroad employers. Practically all of the individual labor organizations affiliated with the Association are parties to notices filed with railroads under Section 6 of the Railway Labor Act proposing agreements for the stabilization of employment similar to the notice involved in the present litigation. Moreover, the effect of the decision below is much more far sweeping than to simply forbid railway labor organizations from pursuing negotiations on such notices. The decision imposes restrictions on the commands of the Railway Labor Act that employees and carriers exert reasonable efforts to settle "all disputes" between them in conference and substitutes the Federal courts as the arbiters of what disputes may or may not be settled by such negotiations. This constitutes a direct judicial interference in the realm of collective bargaining that was never intended by Congress and was in fact long ago outlawed by statutory enactment. The decision also holds that state agencies may grant a railroad permissive au-

thority which will bar collective bargaining under the Railway Labor Act. This constitutes a novel and disastrous limitation on the Federal statute.

### III

This interest of all railway labor organizations in the decision below and its broad impact upon all their collective bargaining efforts in the rail transportation field cannot adequately be presented by petitioners. The petitioners must of necessity direct their attention primarily to the immediate problems created for their own organization by the decision below. In addition, the petitioners are not in the same position as is the Association to speak for the whole of railroad labor on the adverse impact of such decision generally on collective bargaining in the rail industry. The presentation of these considerations is clearly relevant to the disposition of the petition as it demonstrates not only the importance of the questions of Federal law that are involved but also bears strongly upon the correctness of the decision for which review is sought.

WHEREFORE, the Association moves the Court for leave to file the brief annexed hereto in support of said petition for certiorari.

Respectfully submitted,

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June, 1959

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

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No.

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THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,  
*Petitioners*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,  
*Respondent*

---

**BRIEF OF RAILWAY LABOR EXECUTIVES' ASSO-  
CIATION IN SUPPORT OF PETITION  
FOR CERTIORARI**

---

**OPINIONS BELOW**

The opinion of the United States District Court for the Northern District of Illinois and the opinion of the Court of Appeals are attached as appendices to the petition.

**JURISDICTION**

The petition adequately sets forth the basis of jurisdiction.

**QUESTIONS PRESENTED**

In addition to the questions set forth in the petition, this case, in the opinion of the Association, presents the question of whether Congress intended to nullify

collective bargaining in the railroad industry by requiring labor organizations to litigate in advance their right and duty to settle particular disputes with railroads through negotiation or whether the Railway Labor Act means what it says in imposing a duty on employees and carriers to settle *all* disputes in conferences between them in order to avoid interruptions to commerce.

### **STATUTES INVOLVED**

The statutes involved are set forth in full in the petition.

### **STATEMENT**

The facts relating to the development of the present litigation are set forth in the petition.

### **REASONS FOR GRANTING THE WRIT**

1. There can be no question but that the petition for certiorari raises some of the most important problems in the construction and application of the Railway Labor Act and the Norris-LaGuardia Act ever presented to this Court. The decision below represents the first time that a Court of Appeals has placed limitations upon the subject-matter of a notice served under Section 6 of the Railway Labor Act or has restricted the Congressional mandate of Section 2 of that statute (45 U.S.C.A. 152), imposing a duty on carriers and their employees to exert every reasonable effort to settle "all disputes" in conference between them whether arising out of the application of agreements or otherwise. In so doing, the decision below has interpreted the Railway Labor Act and the Norris-LaGuardia Act in a manner which will effectively hamstring collective bargaining in the railroad industry

and destroy the usefulness of the former statute as a vehicle for peaceful labor-management relations in that industry. Under the decision below, a carrier can simply refuse to negotiate upon any subject presented to it in a Section 6 notice and the organizations representing carrier employees have no recourse except long and expensive litigation to determine whether they are even to be permitted to bargain. The Federal Courts thus become the arbiters of whether collective bargaining shall even begin while at the same time the employees are enjoined from pressing their request for conferences to settle their dispute. The stultifying effect of such a decision on collective bargaining in the railroad industry is so obvious as not to require argument. The correctness of an interpretation of two Federal statutes bringing about such a result clearly raises issues which this Court ought to review and decide.

In addition, the Court of Appeals has indicated that the permission given the respondent railroad by the South Dakota and Iowa Commissions to put into effect its so-called Central Agency plan is a bar to any bargaining under the Railway Labor Act concerning the continued employment of the men involved. The suggestion that such permission of a state agency can override the mandatory bargaining requirements of a Federal statute gives rise to fundamental questions regarding the regulation of interstate commerce which should be reviewed by this Court. If the obligations of the Railway Labor Act can be nullified by state action, those obligations have little meaning.

2. The decision below is believed to conflict with decisions of this Court concerning the right of employees

to strike, the application of the Norris-LaGuardia Act, and the scope of the Railway Labor Act.

The decision is contrary to the decision in *United States v. Carrozo*, 37 F. Supp. 191 (D.C. Ill., 1941), sustained by this Court per curiam in *United States v. International Hodcarriers, et al.*, 313 U.S. 539 (1941), and the decisions in *United States v. American Federation of Musicians*, 47 F. Supp. 304 (1942), affirmed by this Court per curiam in *United States v. American Federation of Musicians*, 318 U.S. 740 (1943). In the *Carrozo* case, the District Court involved made the following findings with respect to lawful activities of a labor organization:

“Such normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce their demands, as in the present case a demand against the use of labor saving devices which will displace their members; or, in the alternative, the demand that if the labor saving device is used the same number of men be employed as would be if the other type of mixer were used. These are legitimate and lawful activities which a labor union is permitted to carry on in an effort to maintain employment and certain working conditions for its members, and any restraint of trade or commerce attendant thereon is only indirect and incidental.”

This is a square holding, affirmed by this Court, to the effect that it is a legitimate and lawful activity for a labor union to protect job opportunities and stabilize employment by seeking agreement with employers on the use of labor saving machinery, which is certainly one of the objectives of the proposals here involved.

The Association also believes that the decision of the Court of Appeals with respect to the application of the Norris-LaGuardia Act is contrary to the decisions of this Court which make clear that such statute was intended to "drastically" curtail the jurisdiction of Federal courts in the labor field and that the term "labor dispute" as used in that Act must be given a liberal interpretation in light of its purpose. *Milk Wagon Driver's Union Local 753 v. Lake Valley Farm Products*, 311 U.S. 91 (1940). In holding that the threatened strike did not arise out of a labor dispute within the meaning of the Norris-LaGuardia Act because of the purposes thereof, the decision below is directly contrary to that of this Court in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), where the Court declared (pp. 559-560):

" \* \* \* The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

Moreover, the decision below is inconsistent with the decision of this Court in *Hunt v. Crumbach*, 325 U.S. 821 (1945) where the Court declared that Congress recognized an absolute right in employees to strike according to their own judgments (p. 825, f.n. 1):

"*Dorchy v. Kansas*, 272 U.S. 306, 311, 71 L.ed. 248, 269, 47 S. Ct. 86, cited here in dissent, has

no relevancy to the issues before us. In that case Dorchy was convicted of calling a strike to enforce a state claim contrary to state law. He attacked the state law on the ground that the right to strike was guaranteed by the Fourteenth Amendment. This Court rejected Dorchy's constitutional contention with the statement that 'Neither the common law nor the Fourteenth Amendment, confers the absolute right to strike.' The Court had no reason in the Dorchy case to consider the Clayton Act, which as we decided in the *Hutcheson Case* does recognize an absolute right of employees to work or cease working according to their own judgments. That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations."

The Association also believes that the decision of the Court of Appeals with respect to the application of the Norris-LaGuardia Act is in direct conflict with the decision in *Diamond Full Fashion Hosiery Co. v. Leader*, 20 F. Supp. 467 (D.C.E.D., Pa., 1937), which was handed down by then District Judge Maris, now Senior Circuit Judge of the Third Circuit, in which the court held that the Norris-LaGuardia Act prohibited it from enjoining a strike by the employees of a plant to prevent the shutting down of that plant and the transfer of its machinery for use in a business in another state. In holding the Norris-LaGuardia Act applicable to the situation, the Court declared (p. 469):

"Does it involve a controversy concerning terms of conditions of employment? I think it does. *Certainly the duration of employment is one of its most vital terms.* Here the defendants had

a union contract which was in force on August 6, and it was their contention that they had been locked out of their employment by the Vogue Company. I am satisfied from the evidence that their sole purpose in picketing the Vogue Mill was to endeavor to get their jobs back. All of the elements of a labor dispute were present. *Whether the defendants' position was justified or had any real basis is beside the point and is not for this court to pass upon. The fact remains that there was a dispute between the defendants and the Vogue Company and that it was a labor dispute.*" (Emphasis supplied.)

The appeal from this decision of the Third Circuit was dismissed on agreement of counsel, 99 F. 2d 1001 (1937).

The holding of the court below that the permission granted the respondent by state agencies to put into effect its so-called Central Agency plan bars negotiation pursuant to the Section 6 notice served on respondent by petitioners obviously conflicts with the holding of this Court in *California v. Taylor*, 353 U.S. 553 (1957).

3. The decision below is incorrect. The petition analyzes the error involved in the reasoning upon which the decision below is based. This analysis and argument, which will not be repeated here, demonstrate the invalidity of that decision. In addition, such invalidity is further demonstrated by the fact, as shown above, that it is contrary to an extensive line of decisions broadly applying the right to bargain and strike and giving a liberal interpretation to the Norris-LaGuardia Act. The decision below represents a step backward on the long road in the development of collective bargaining. Its adverse effect upon such bargaining,

as previously shown, strongly militates against the correctness of the decision as a proper interpretation and application of statutes designed to obtain industrial peace through face to face bargaining of carriers and employees.

### **CONCLUSION**

For the foregoing reasons, the petition of The Order of Railroad Telegraphers for a writ of certiorari should be granted.

Respectfully submitted,

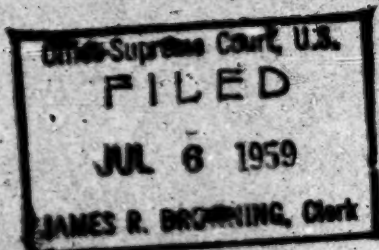
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IN THE  
**Supreme Court of the United States**

October Term, 1958

No. **100**

**THE ORDER OF RAILROAD TELEGRAPHERS,**  
**A VOLUNTARY ASSOCIATION, ET AL.,** *Petitioners,*  
*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY**  
**COMPANY, A CORPORATION,** *Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR**  
**CERTIORARI**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958.

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**No. 984**

---

THE ORDER OF RAILROAD TELEGRAPHERS,  
A VOLUNTARY ASSOCIATION, ET AL.,

*Petitioners,*

*vs.*

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, A CORPORATION,

*Respondent.*

---

**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI.**

---

Chicago and North Western Railway Company ("North Western"), under Rule 24 of this Court, submits this brief in opposition to the petition for certiorari filed by The Order of Railroad Telegraphers, *et al.* ("ORT").\*

**STATEMENT.**

In order that the Court may see the actual—and markedly narrower—setting giving rise to the issues which the petition seeks to present, the ORT's statement requires supplementation. These further facts relate to (1) the direct connection between the contract demand and the Central

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\*Record references hereinafter are to the Joint Appendix filed by the ORT with its petition. Emphasis is supplied throughout this brief.

Agency Plan; (2) the efforts by North Western to bargain with the ORT on a meaningful basis; and (3) the independent basis for injunctive relief to which North Western is entitled under *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

1. On April 1, 1956 a new management took over at North Western. The first quarter loss had been \$8,000,000; and the cash position was deteriorating so fast as to raise the spectre of bankruptcy. A principal reason for this was that North Western had lagged badly in the adaptation of its operations to new and changed conditions, with the result that it had the worst (*i. e.*, the highest) ratio of wage and salary expense to the revenue dollar of any railroad (App. 82-86).

The new management initiated a number of modernization programs (App. 86-88); and, in order to cushion the economic impact of these programs on the employees affected, it entered, on December 27, 1956, into the first Supplemental Unemployment Benefits Agreement in railroad history. All of the major non-operating organizations, except the ORT, to which it was also offered, were parties to this agreement (App. 102-103, 303ff.).

On November 5, 1957 North Western first announced a modernization program affecting the ORT. On that date it petitioned the Public Utilities Commission of South Dakota for authority to place in effect its Central Agency Plan "under which the service area of certain station agents was extended to include a neighboring station or stations without any curtailment of service to shippers" (264 F.2d at p. 256). The petition disclosed that authority for the Plan would be sought on a system-wide basis, and petitions to this end were subsequently filed with the regulatory commissions of Iowa, Minnesota and Wisconsin (App. 90-91). Approximately six weeks after this disclosure, and after the presentation in the South Dakota

hearings of North Western's direct case and the ORT's cross-examination in respect of it, the ORT served on North Western, purportedly under Section 6 of the Railway Labor Act, a demand that a clause be added to the existing contracts providing that no position filled by a member of the ORT on December 3, 1957 may be abolished or discontinued without the prior consent of the union (App. 32).<sup>1</sup>

Hearings were held before the South Dakota Commission at various points throughout the state beginning November 25, 1957 and ending January 17, 1958. The ORT appeared in those proceedings (as it did in the other states) to protest the granting of the authority sought, presented evidence, and, at the conclusion of the hearings, filed a brief and participated in oral argument before the Commission. On May 9, 1958 the Commission entered an order which directed North Western to put its Plan into effect forthwith (App. 172ff., 91-92).

The petition in Iowa was filed January 24, 1958; and the Iowa State Commerce Commission held hearings on it throughout the state beginning March 18, 1958 and ending June 6, 1958. The Commission's decision (App. 216ff., 230-231, 92-93) putting the Plan into effect came on August 11, 1958.<sup>2</sup>

---

1. As the Court of Appeals notes in its opinion (264 F. 2d at p. 256), throughout the state commission proceedings the ORT asserted that the Central Agency Plan could not be effectuated under the limitations of its existing contracts with North Western. North Western has denied that this is so; and this issue as to the application or interpretation of an existing contract would appear to present a "minor dispute" under the Railway Labor Act. Although the Plan was placed in effect in South Dakota and Iowa in May and August of 1958, respectively, no grievances or claims for lost pay based upon the ORT's construction of the existing contracts were submitted to North Western until after the District Court's judgment had been entered.

2. The Central Agency Plan was also approved by the Minnesota and Wisconsin Commissions on November 12, 1958 and January 20, 1959, respectively (Minnesota—Docket A-7559; Wisconsin—Docket 2-R-3380). Judicial notice may be taken.

On July 10, 1958—after the South Dakota order but while the proceedings were pending in the other states—the ORT circulated to all its members a letter and strike ballot (App. 54). That letter stated in part:

“Last fall a program of this sort that is of vital concern to our members was initiated by this management. This program is directed at the elimination of the vast majority of agents serving one-man stations. Proceedings were begun before the Public Service Commission of South Dakota, Minnesota, Iowa and Wisconsin seeking authority either to close nearly all the one-man stations or to have one agent serve two, three or four stations. Similar proceedings in other states may be expected momentarily.

“In the public interest, as well as in the interest of our members and the organization as a whole, we have done everything possible to resist this program. Through reliance on the provisions of our Agreements, through informing the residents of the affected communities as to the consequences of the railroad’s actions and through attendance at all the hearings of the various commissions and the presentation of evidence and argument, we have tried to make reason, common sense and humanity prevail. Since last November practically all of the time of your General Chairmen and four Vice Presidents as well as much of the time of a number of our Local Chairmen and our General Counsel and of our President has been devoted to these efforts.

*“However, it became evident at an early date that to meet this onslaught effectively would require strengthening of our Agreements. . . .*

*“While we hope the commissions in other states will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota.”*

One week after the Iowa Commission issued its order, the ORT issued a strike call for August 21, 1958. In this

call, quoted at length in the opinion below, appears this language (264 F. 2d at p. 257):

"The need for the proposed rule has again been tragically demonstrated in the last few days. What happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged."

2. Approximately two weeks after the South Dakota Commission entered its order on May 9, 1958, Mr. Ben W. Heineman, North Western's Chairman, sought out Mr. George E. Leighty, President of the ORT, and inquired as to whether the ORT would be interested in discussing terms for cushioning the impact of the Central Agency Plan, either in respect of South Dakota or on a system-wide basis. Although these overtures were rejected, Mr. Heineman stated that his door would always remain open for such discussions (App. 76-77, 105).

On August 27, 1958 Mr. Heineman again directly indicated to the ORT his willingness to discuss any alternatives designed to minimize the economic impact of the Plan on the employees affected, including severance pay; and the ORT was informed that the Supplemental Unemployment Benefits Agreement would be extended to it on a retroactive basis to December 3, 1957, the date fixed in the contract demand (App. 99-106, 118-119).

In the course of the emergency mediation after the strike call, the Federal Mediator asked North Western's Director of Personnel for any suggestions which might conceivably form a basis of settlement. Mr. Van Patten said that, without prejudice to his position regarding the illegality of the demand, he thought there was a possibility of settling the entire question involving the proposed rule by an arrangement limiting the number of layoffs per year to an agreed percentage of the total jobs, over and above the reductions attributable to attrition. The Mediator in-

licated that this gave him something to work with and that, if the ORT was at all interested, he would call Mr. Van Patten the following day. He did not call (App. 157-58).

3. North Western and the ORT are parties to the so-called National Agreement of November 1, 1956. Article VI of that Agreement provides that, until its expiration on October 31, 1959, no contract demand will be served which establishes compensation in respect of time paid for but not worked (App. 100). Although there is an exception for proposals relating to "stabilization of employment", Special Board of Adjustment No. 215 has found that proposals for payments for time not worked do not fall within the meaning of this exception (App. 287ff.). On August 21, 1958 North Western advised the ORT that it considered the contract demand to be barred by this moratorium provision; and the following day North Western filed its submission of this dispute with the National Railroad Adjustment Board, where the matter is pending for decision (App. 247, 314).

### **QUESTIONS PRESENTED.**

1. Did Congress intend that the interruption of interstate commerce incident to a railroad strike can be founded upon a contract demand that no position in being on a date antecedent to the demand be discontinued without the union's consent, where the purpose and effect of such demand is to prohibit the carrier's compliance with state commission orders in a sector of interstate commerce left by Congress to state regulation in the interest of economical and efficient transportation service to the public?

2. May a labor organization lawfully strike to enforce a demand, the propriety of which under the moratorium clause of an existing labor agreement presents a substantial question as to the application or interpretation of, that

agreement, thereby involving a "minor dispute" which has itself been duly submitted to, and is pending before, the National Railroad Adjustment Board?

### **REASONS FOR DENYING THE WRIT.**

1. The decision below has neither the novelty nor the breadth of application claimed for it in the petition. The Court of Appeals, taking careful note of the special facts of the relationship between the contract demand and the Central Agency Plan, held that the collective bargaining processes of the Railway Labor Act cannot be so used to circumvent or subordinate state regulation, citing its own earlier holding to this effect in *In re Chicago, North Shore and Milwaukee R. Co.*, 147 F. 2d 723, cert. denied, 325 U. S. 852 (1945). This case was founded upon *Missouri Pacific R. Co. v. Norwood*, 42 F. 2d 765 (D. C. W. D. Ark. 1930), aff'd 283 U. S. 249, and *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943), where this Court told the carriers that Congress had provided no sanctuary in the Railway Labor Act from state regulation. There is, thus, no important question of federal law presented by the petition which has not been settled by this Court; nor is there any conflict of decision.

2. Over and above the matter of state regulation, the decision below reflects the special facts of record which show the incompatibility between the demand and other Congressional objectives in respect of economic, efficient and uninterrupted interstate transportation; and the resulting accommodation of Norris-LaGuardia to these policies is fully consistent with this Court's recognition that such accommodation must be made.

3. North Western was entitled to the injunctive relief directed by the Court of Appeals on a ground presented to, but not reached by, that court, namely, the pendency before

the National Railroad Adjustment Board of the issue of whether the ORT's contract demand was barred by the moratorium provisions of the National Agreement. The injunction can, thus, rest squarely on this Court's holding in *Chicago River*.

4. The challenge to the jurisdiction of the District Court, urged for the first time in this Court, is wholly lacking in substance. *Chicago River* itself, where diversity was lacking, is a clear authority to this effect.

5. Contrary to the assertions in the petition, the Court of Appeals did not dispose of the issues of (1) the propriety of the injunction pending appeal and (2) the cooling-off period limitations of the Railway Labor Act. With the disposition it made of the merits of North Western's appeal, it had no occasion to pass upon these questions. It has not, therefore, in the words of Rule 19, "*decided an important question of federal law.*"

## ARGUMENT.

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### I.

**The Court of Appeals Correctly Held, on the Basis of Established Law, That Congress Did Not Intend That the Interruption of Interstate Commerce Incident to a Railroad Strike Could Result from a Demand Directed Against the Effectuation of Valid State Regulatory Orders.**

The decision below reflects the settled proposition that the collective bargaining processes of the Railway Labor Act were never intended to permit the frustration of legitimate state regulatory requirements. This dominant concern of the Court of Appeals clearly emerges from its opinion. Thus, the Court recites these facts (264 F. 2d at p. 256):

"North Western filed petitions for authority to effectuate the Central Agency Plan with the public utilities commissions of South Dakota, Iowa, Minnesota and Wisconsin. In South Dakota, the Public Utilities Commission held hearings at various points throughout the State over a period of about two months. The Union appeared in the proceedings to protest the granting of the authority sought; presented evidence, participated in filing briefs with, and in oral argument before, the Commission. . . .

"In the Commission proceedings, the Union took the position that the Central Agency Plan could not be put into effect without agreement of the Union under the existing collective bargaining contracts. However, a few weeks after North Western filed its first petition in South Dakota, the Union sent North Western letters under Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 151, *et seq.*) requesting that the existing

collective bargaining agreements be amended by adding the following provision:

'No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization.' "

The Court also attached importance to the primary purpose expressed in the ORT strike call of rendering ineffective the regulatory orders of the South Dakota and Iowa Commissions (264 F. 2d at p. 257).

With reference to these unique facts as they had developed between this union and this railroad, the Court of Appeals made these additional statements leading inexorably to its ultimate holding (264 F. 2d at pp. 258-259):

"Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. The Union is thus attempting to attain, through the collective bargaining processes of the Railway Labor Act, that which would prohibit North Western from complying with the orders of the South Dakota Public Utilities Commission and the Iowa State Commerce Commission.

"This contract proposal, if accepted, would enable the Union to control the pace of North Western's compliance with the Commission orders aforesaid.

"A carrier may not escape its obligations by bargaining them away. The Commission orders may not be circumvented by a contract entered into by a carrier and a union under threat of strike."

The Court thereupon stated its conclusion in these terms (264 F. 2d at p. 260):

"We, therefore, hold that such a demand as here made by the Union is completely outside the ambit of 'rates of pay, rules and working conditions', as those words are used in the Railway Labor Act, *In re Chicago North Shore and M. R. Co.*, 7 Cir. 1945, 147 F.

2d 723, 727, cert. den. 325 U. S. 852, and hence is not within the scope of mandatory bargaining. Therefore, the terms of the Norris-LaGuardia Act are here inapplicable."

The citation of *North Shore* is of basic significance, for that case was the culmination of a series of decisions holding that the collective bargaining provisions of the Railway Labor Act were not intended by Congress to permit the circumvention of state regulatory authority. In that case, the ultimate issue was whether, in order to comply with state regulatory orders, a carrier could change what the labor organization deemed to be "working conditions" under the Railway Labor Act without first reaching agreement with the organization with respect to such changes under Section 6 of that Act. In holding that compliance with state law could not be made contingent on the ability of the parties to reach prior agreement under the Railway Labor Act, the Court stated (147 F. 2d at p. 727):

"The phrase 'working conditions' means such conditions affecting the work of the employees as might be the subject of agreement between North Shore and its employees, *Missouri Pac. R. Co. v. Norwood*, D. C., 42 F. 2d 765, 773, affirmed 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010. The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work required of employees. It does not exclude a State from exercising its police power. *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, *supra*, 318 U. S. 6, 63 S. Ct. 420, 87 L. Ed. 571."

In the union's petition for certiorari to review the *North Shore* decision, denied by this Court, it was asserted that the Court of Appeals committed error "(I)n holding that the term 'working conditions' as used in Section 6 of the Railway Labor Act, does not include any and all circumstances concerning work required of employees covered in a

collective bargaining agreement." This is of significance in connection with the claim made in the ORT's petition that the Court of Appeals has once again erred in recognizing that there are limitations upon the use to be made of the collective bargaining procedures provided by Section 6.

In *Missouri Pacific*, a three-judge district court upheld the validity of an Arkansas full crew law against the carrier's claim that, in the determination of railroad working conditions, Congress, by the Railway Labor Act, had intended to vest in the collective bargaining provisions of federal law a controlling supremacy over state regulatory requirements. This Court affirmed. *Terminal Railroad* involved a similar claim—in this case in relation to a state commission requirement as to caboose cars. In rejecting this contention, this Court upheld the validity of state authority exercised in the public interest, and expressly rejected the argument that Congress intended to preempt, by the Railway Labor Act, the regulation of working conditions in such manner as to nullify state authority.<sup>3</sup>

The present case differs from these authorities relied upon by the Court of Appeals only in the fact that the ORT has, in anticipation of the state commission orders, actually served a notice, purportedly under Section 6 of the Railway Labor Act, containing a demand incompatible with compliance by North Western with those orders. By simply standing on this demand, the ORT thinks to give North Western this choice: Obey the orders and take a strike, or let us have the final say as to whether the orders may be carried out. Is it conceivable that, in *Terminal Railroad*, for example, had the carrier alertly served a Section 6 notice, it could ultimately have forced its employees to choose between a lock-out, on the one hand, and the benefits

3. Another error alleged to have been committed by the Court of Appeals in the petition for certiorari in *North Shore* was "(I)n holding that the decision of this Court in (*Terminal Railroad*) was controlling."

of the state commission order, on the other? Quite properly, therefore, in the present case the Court of Appeals held that where state regulatory authority is specifically directed to the conditions under which regulated transportation service is provided, Congress did not intend that the collective bargaining procedures of the Railway Labor Act could be used by private interests to achieve control over such state regulation.<sup>4</sup>

The ORT argues that the state regulatory orders in this proceeding, being permissive rather than mandatory, are accordingly relegated to a subordinate position.<sup>5</sup> This seriously misconceives the regulatory function and purpose of "permissive" orders as an instrumentality of Congress.

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4. Cf. *Local 24 of Int'l Brotherhood of Teamsters v. Oliver*, Oct. Term, 1958, No. 49; 79 S. Ct. 297 (1959). This case involved the relationship between (1) certain long-standing collective bargaining provisions relating to wages previously entered into under the Labor Management Relations Act, and (2) a subsequent state court construction of a state anti-trust statute having general application, but only within the area of intrastate commerce. The exercise of state authority did not occur in a regulatory field in which Congress has continued to rely on effective state regulation as an important instrumentality in furthering its policies with regard to efficient and economical transportation in interstate commerce.

5. The only authority cited by the ORT on this issue is *California v. Taylor*, 353 U. S. 553 (1957). That case holds that it was the intent of Congress that a State which owns and operates a railroad otherwise subject to the provisions of the Railway Labor Act must stand in the position of management under the Act. That case does not purport to deal with the separate issue of whether Congress intended that collective bargaining procedures of the Railway Labor Act can be used to circumvent state regulatory authority exercised in the general public interest. The significance of this distinction is not lost on the ORT which, in quoting from this case (Petition, p. 35), carefully omitted the italicized words from the following phrase "would take precedence over conflicting provisions of state *civil service* laws." It is also significant to note the response of Congress to situations in which it does wish to assert federal supremacy under the Railway Labor Act over provisions of state law. Thus, Section 2(11), of the Railway Labor Act, by a 1951 amendment, expressly authorizes union shop contracts notwithstanding any state law.

sional policy, both at the level of federal and state government.<sup>6</sup>

This Court has stated that a "primary aim" of Congressional transportation policy is the "avoidance of waste" and the achievement of the "essential conditions of economy and efficiency." *Texas v. United States*, 292 U. S. 522, 530-1 (1934); *Seaboard Railroad Company v. Daniel*, 333 U. S. 118, 124-5 (1948).

The elimination of unprofitable services and operations, which have been rendered obsolete by the dynamic development of competitive transportation modes, provides one basic method of realizing these objectives. The abandonment of unprofitable branch lines, the consolidation and merger of separate companies, pooled operations and the elimination of duplicate facilities through joint use of remaining facilities, are among the specific procedures available for the minimization of waste.

Interstate Commerce Commission orders exercising this authority, permissive in form though they may be, are not to be regarded as administrative favors bestowed on private interests for purely private purposes. On the contrary, they reflect the essential mutuality of the public, and the managerial, interest in the avoidance of waste. In this connection Justice Brandeis has stated, with specific reference to branch line abandonments: "The certificate issues, not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination." *Colorado v. United States*, 271 U. S. 153, 162 (1926).

While Congress has vested primary regulatory responsibility for the achievement of its aims in the Interstate Commerce Commission, it has at the same time been content

6. The initial order of the South Dakota Commission, which "authorized and directed" the inauguration of the Central Agency Plan, was in fact mandatory (App. 191, 194). The Commission's order denying rehearing did not modify this mandatory character of its order (App. 213-215).

to leave to the states a number of aspects of railroad regulation, including some which involve interstate commerce itself. Where Congress has chosen the latter course, the motivation is not a lessening of interest in the achievement of efficient and economic rail service, but rather an exercise of judgment that the job of achieving these purposes in the particular instance can safely be left to the states.

Station agencies have long been one of the areas of railroad operations left by Congress under state control. Significantly for present purposes, the last Congress decided to make no change in this area, and it struck from the Transportation Act of 1958 as introduced the language which would have given to the Interstate Commerce Commission powers with respect to station agencies comparable to those then vested in it for the first time with respect to train operations.<sup>7</sup> Thus, Congress has consciously continued to leave to state regulation the responsibility for regulating station facilities in such manner as to assure that the railroad will provide the volume and pattern of service required for both inter- and intrastate commerce at the lowest cost. The fact that state regulatory orders are more often permissive rather than mandatory in form does not in any way derogate from their vital importance as an instrumentality of Congressional policy in promoting an adequate, efficient and economical national transportation system.

Having left determinations of this kind to be made by the

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7. S. 3778, 85th Congress, 2d Session, added Section 13 (a) to the Interstate Commerce Act. These new provisions vest an ultimate jurisdiction in the Interstate Commerce Commission over the "discontinuance or change, in whole or in part, of the operation or service of any train or ferry". S. 3778, as originally introduced on May 8, 1958, would have also vested jurisdiction in the Commission under Section 13 (a) over the "operation or service of any station, depot or other facility where passengers or property are received for transportation in interstate, foreign and intrastate commerce, • • •".

state commissions in the exercise of their best judgment as to what is necessary to advance the public interest in both interstate and intrastate commerce, can it be thought that it was the intention of Congress simultaneously to nullify this state authority by its complete subordination to the collective bargaining procedures of the Railway Labor Act? Did Congress intend that the South Dakota and Iowa orders may be set at naught by the economic pressure of a strike to enforce a demand that the power to determine what station agent jobs are necessary in Iowa and South Dakota be vested in the ORT rather than in the state commissions? These questions answer themselves; and they were long ago answered by this Court in the authorities relied upon by the Court of Appeals.

Meaningful collective bargaining in the railroad industry did not come to an end as a result of the *North Shore* decision and this Court's denial of certiorari, despite the following prophesy made by the union in its petition for review of that decision:

"If this Court should approve this back-door method of avoiding agreements, and winking at federal statutes, it would encourage similar action by other carriers and result in a national upheaval of serious consequences."

## II.

### **The Decision of the Court of Appeals Involves None of the Broad Issues Which the Petition Seeks to Raise.**

The ORT characterizes the opinion of the Court of Appeals as (1) embracing a "baronial" concept of managerial prerogatives, (2) establishing the federal courts as the arbiters of the appropriate subjects for collective bargaining, and (3) reviving the historic abuses banned by *Norris-LaGuardia*. The Court's decision, reflecting a proper accommodation of general Congressional policies

embodied in the Interstate Commerce, Railway Labor and Norris-LaGuardia Acts, supports none of these characterizations.

1. Reliance on the efficient discharge of the managerial function as a major instrumentality in promoting Congressional regulatory aims is reflected in Section 15a(2) of the Interstate Commerce Act. The importance of carrier initiative to achieve the public aim of waste avoidance is further emphasized in the following criticism made by the Senate Committee on Interstate and Foreign Commerce in its report on S. 3778, culminating in the Transportation Act of 1958:

"The railroad industry has not, in the sub-committee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; joint use of facilities in order to eliminate waste, such as multiple terminals and yards that require expensive interchange operations; reduction of duplications in freight and passenger services by pooling and joint operations; abandonment or consolidation of non-paying branch and secondary lines, abolishing of unnecessarily circuitous routes for freight movements; improved handling of less-than-carload traffic; coordination of transportation services and facilities by establishment of through routes and joint rates with other forms of transportation; and modernization of the freight-rate structure, including revision of below-cost freight rates to levels that cover cost and yield some margin of profit as well as adjustment of rates excessively above cost to attract traffic and yield more revenue." (Sen. Report No. 1647, 85th Cong., 2nd session, p. 11.)

Thus, the incidental references to the managerial function contained in the opinion below must be considered in the context of the specific legislative purposes embodied in the unique structure of federal and state regulatory law in the railroad industry. The broad impact on the entire field

of labor-management relations which the ORT purports to find in the opinion below is without foundation.

2. The ORT's assertion that the opinion below tends to establish federal courts as arbiters of "bargainability" reflects a profound misunderstanding of the limited use for which the Court cites *N. L. R. B. v. Borg-Warner*, 356 U. S. 342 (1958). The concept of a dispute not within the scope of the duty to bargain is not borrowed from the Labor Management Relations Act. That concept derives inevitably from the decisions of this Court construing the relationship between the Railway Labor and Norris-LaGuardia Acts. *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952); *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949); *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944). In the light of these cases, it could not be argued that a duty would be imposed on a carrier to bargain on a demand to abolish all positions occupied by members of a particular racial group. Nor could the refusal of the carrier to bargain on an illegal demand of this character give rise to a lawful strike. Thus, the concept of "the scope of mandatory bargaining", if not the precise phraseology, is contained in these cases. Because the *Borg-Warner* case does in fact contain appropriate language to express this concept, the Court of Appeals found it useful to cite that case for this purpose.

3. It is asserted that this case "presents a revival of the historic abuses of the judicial processes against which the Norris-LaGuardia Act was directed". The ORT's extreme rhetorical claims ignore the pronouncements of this Court concerning the need for accommodating the provisions of that Act with the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, 353 U. S. 30, 42 (1957); *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 (1937).

The Negro discrimination cases clearly establish the existence of issues concerning which Norris-LaGuardia offers no bar to judicial relief against the realization of illegal purposes. The *North Shore, Missouri Pacific*, and *Terminal Railroad* cases also establish the illegality of efforts to utilize the collective bargaining provisions of the Railway Labor Act to vitiate the exercise of legitimate state regulatory authority. The facts before the Court of Appeals demonstrate that the dominant, if not exclusive, purpose of the threatened ORT strike was to render ineffective and inoperative the orders of the state commissions. In these circumstances, the decision of the Court of Appeals reflects an accommodation of the Norris-LaGuardia, Interstate Commerce, and Railway Labor Acts which is fully supported by judicial authority. See *Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114 (6th Cir. 1957), cert. denied, 355 U. S. 877 (1958); *Norfolk and Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. denied, 355 U. S. 914; and, generally, Note, *Accommodation of the Norris-LaGuardia Act to other Federal Statutes*, 72 Harv. L. Rev. 354 (1958).<sup>8</sup>

Nor can it be suggested that North Western, in refusing to concede the validity of the ORT's demand, failed to fulfill any obligation imposed by law to attempt to achieve

8. The Norris-LaGuardia issue is also raised by the Railway Labor Executives' Association ("RLEA") in its proposed *amicus* brief. This Court has previously had the opportunity to consider the contentions and the authorities presented by the RLEA. With the single exception of its citation of *California v. Taylor*, 353 U. S. 553 (1957), all of the authorities cited by the RLEA were also cited and discussed with identical argumentation in the petition for certiorari filed by the same counsel in the *New York Central* case. In ascribing an absolute primacy to Norris-LaGuardia the RLEA has again chosen to ignore the admonition of this Court in *Chicago River* and *Virginian Ry.* with respect to the need for the accommodation of these statutes, as well as the accommodations effected by this Court in the *Howard, Graham*, and *Steele* cases.

agreement with regard to the more general subject matter which might have been implied by the demand. The record shows the continuing, but unsuccessful, effort by North Western to discuss arrangements intended to cushion the economic impact of the state commission orders on any employees affected (See point 2 in Statement, p. 5 above). The refusal of the ORT to discuss any proposal other than its original demand reflects its unyielding determination to block the operation of state commission orders through a strike arising from a failure to reach agreement on the original demand itself.

### III.

**The Judgment of the Court of Appeals Is Fully Supported by Additional Grounds Which the Court Did Not Find It Necessary to Reach.**

Additional grounds presented to, but not reached by, the Court of Appeals also exist to support its judgment. North Western has contended that the ORT's demand is barred by the moratorium clauses of the National Agreement in effect between the parties; and that issue, involving the application or interpretation of an existing labor agreement, was submitted by North Western to the Adjustment Board. The submission was docketed by, and is pending before, the Board. This Court squarely held in *Chicago River* that the Norris-LaGuardia Act does not bar injunctive relief against a threatened strike which unlawfully seeks to substitute self-help with respect to a minor dispute subject to the jurisdiction of the Adjustment Board.

## IV.

### **The Challenge to the Jurisdiction of the District Court Is Without Substance.**

The ORT has chosen to urge in this Court for the first time a jurisdictional issue which was neither argued nor decided in the courts below. The basis for its position that this issue is now ripe for decision by this Court is an edited quotation from a footnote in Mr. Justice Rutledge's opinion in *Brotherhood of Railroad Trainmen v. Toledo, Peoria and Western Railroad Company*, 321 U. S. 50 (1954) at p. 54. The language in the petition (p. 36) is as follows:

"No jurisdiction can be predicated upon § 1331 of the Judicial Code for the reasons stated by Mr. Justice Rutledge in this language: 'the cause of action is one merely for the exercise of the general police power in the protection of the railroad's property. The complaint \* \* \* does not specify any provision of the federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act [and the Railway Labor Act.] \* \* \* cf. *Cohens v. Virginia*, 6 Wheat. 264; *Norton v. Whiteside*, 239 U. S. 144; *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Gully v. First National Bank*, 299 U. S. 109.' "

Justice Rutledge's actual words are (the emphasized words being those omitted from the petition):

"*Petitioners say jurisdiction is lacking since the cause of action is one merely for exercise of the general police power in the protection of the railroad's property. The complaint, it is said, does not specify any provision of federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act and the statute making criminal specified interferences with interstate railroad property.* 18 U. S. C. § 412(a); cf. *Cohens v. Virginia*, 6 Wheat. 264; *Norton v. Whiteside*, 239 U. S. 144; *Niles-Bement-*

*Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Gully v. First National Bank*, 299 U. S. 109."

Characterization of this kind of use of authorities is best left to the court which is thus imposed upon. It is enough for us to note that "the reasons stated by Mr. Justice Rutledge," did not purport to be his reasons at all; and that the reference to the Railway Labor Act is sheer invention.

Jurisdiction in this proceeding is alleged in the complaint as based primarily on Sections 1331, and 1337 of the Judicial Code, the Railway Labor Act, and the Interstate Commerce Act (App. 5). The existence of federal jurisdiction in these circumstances was recognized in *Brotherhood of Railroad Trainmen v. New York Central Railroad Company*, 246 F. 2d 114 (1957), cert. denied, 355 U. S. 877 (1958).

The jurisdictional allegations in this case are virtually identical with those in *Chicago River*. In that case, where diversity was lacking, the power of the federal judicial system to achieve any necessary accommodation of Norris-LaGuardia and other Congressional policies was not left to the fortuities of the residence of the parties.

### CONCLUSION.

For the reasons hereinabove stated, the ORT's petition, and the RLEA's motion for leave to file a brief *amicus curiae* in support thereof, should be denied.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958<sup>9</sup>

N [REDACTED] 100

THE ORDER OF RAILROAD TELEGRAPHERS,  
A VOLUNTARY ASSOCIATION, ET AL.,  
*Petitioners,*

*vs.*

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, A CORPORATION,  
*Respondent.*

**PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S  
BRIEF IN OPPOSITION TO CERTIORARI.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958.

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**No. 984**

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**THE ORDER OF RAILROAD TELEGRAPHERS,**  
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*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY**  
**COMPANY, A CORPORATION,**  
*Respondent.*

---

**PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S**  
**BRIEF IN OPPOSITION TO CERTIORARI.**

---

*To the Honorable, the Chief Justice of the United States*  
*and the Justices of the Supreme Court of the United*  
*States:*

Respondent's brief in opposition amounts to a confession of error on the part of the Court of Appeals. That court held flatly that the proposal made by the Union in its Section 6 notice was "completely outside the ambit of 'rates of pay, rules, or working conditions'", 264 F. 2d at 260, and hence did not give rise to a labor dispute as that term is used in the Railway Labor Act and the Norris-LaGuardia Act. The brief in opposition abandons that position en-

tirely. The Railroad now maintains: (1) relying on the untenable secondary theory of the Court of Appeals, that the proposed subject of bargaining was illegal because of the orders of two state regulatory commissions; and (2) without any support in the proceedings below, that, while there was a labor dispute, it was a "minor" dispute concerning the terms of an existing agreement. The brief in opposition neither meets nor refutes the substantial questions presented by the Petition for Certiorari. On the contrary, by formulating new and hypothetical questions for decision by this Court, partly—in an effort to shore up the decision of the Court of Appeals by adducing far-fetched grounds which were not considered by that court—the Railroad has succeeded only in underscoring the need for a resolution by this Court of the questions presented by the Petition for Certiorari.

## I.

### **The Orders of the Regulatory Commissions of South Dakota and Iowa Cannot Alter the Obligation of the Railroad With Respect to Collective Bargaining Under the Railway Labor Act.**

No state law and no order of any state regulatory commission conflicts with the duty of the Railroad to bargain concerning the proposal made in the Section 6 notice. Not even the South Dakota order in its final form purported to do more than approve the Railroad's request for permission to abandon certain stations.\* The respondent ac-

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\* "Accordingly we deem it desirable to clarify, and we hereby amend our Findings and Order so as to eliminate and modify any statement therein which may be construed as an adjudication of the validity of or an interpretation or application of any labor agreement, or as a directive to violate any contract which may in fact exist or to circumvent the Railway Labor Act in connection with the execution of our Order, \* \* \*." (R. 215.)

"Correctly construed the Commission's Order does not conflict

knowledges on pages 13 and 15 of its Brief in Opposition that both orders were permissive and not mandatory. There could, therefore, be no conflict between those orders and a collective bargaining agreement resulting from the Section 6 notice.

It is true that there is an area within which valid state regulation is not displaced by the process of collective bargaining. Conflicting state regulation of interstate railroad operations has been sanctioned by this Court, however, only where it can be shown clearly to relate to health or safety. See *Terminal Railroad v. Trainmen*, 318 U. S. 1, 6-7 (1943). And even where state regulation is concerned with health or safety it may be subordinated to national policy. See *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). The Railroad has suggested, and can suggest, no reason why the regulatory commissions of two states should be conceded power to determine, without reference to considerations of health or safety, questions relating to rates of pay, rules, and working conditions—questions which national policy has committed to the process of collective bargaining.

The Railroad suggests that on this score the opinion of the Court of Appeals is supported by its own prior decision in *In re Chicago & North Shore and M. R. Co.*, 147 F. 2d 723, 727 (7th Cir., 1945), cert. denied 325 U. S. 852.\* Whatever force this assertion might have had is necessarily dissipated by the decision of the Seventh Circuit in the

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with the Railroad Labor Act. The requirement in the Order for a progress report after the expiration of 120 days opened the door to any contingency which may arise including negotiations, strike, federal intervention, proceedings before the Mediation Board, Adjustment Board, or otherwise, in putting the Central Agency Plan into effect." (R. 335.)

\* This was a proceeding in bankruptcy involving construction of certain intercorporate agreements and orders of the bankruptcy court. In so far as the case deals with the Railway Labor Act it holds merely that the Act does not apply to a dispute between employees of a local interstate railway, not subject to the Act, and employees of an interstate carrier.

case of *Taylor v. Fee*, 235 F. 2d 251 (7th Cir., 1956), affirmed by this Court in *California v. Taylor*, 353 U. S. 553 (1957).

Passing the point that the Court of Appeals apparently did not cite that case in support of its holding that state regulation supersedes the provisions of the Railway Labor Act, but rather in support of its strange theory that the subject of the Section 6 notice was not within the scope of "mandatory" bargaining under the Act, we simply observe that the Railroad's somewhat desperate efforts to draw comfort from the denial of certiorari in that case are, of course, as futile as the effort to sustain the decision of the Court of Appeals by citation of its own prior decision.

The Railroad operates in nine states. R. 5. As shown by the opinion of the Court of Appeals, 264 F. 2d at 256, the Railroad applied to the regulatory commissions of four of these states for permission to abandon certain stations. Two of these—South Dakota and Iowa—granted the requested permission. Taking these orders at their maximum possible value, they could affect the negotiations about some—not all—of the jobs held by telegraphers in the two states only. The Union's Section 6 notice related to all positions in all states in which the Railroad operated. The Iowa and South Dakota orders affected only station agent positions in those states. They had no relevance to the question of job security for employees of respondent represented by the Union employed in other states nor in positions in Iowa and South Dakota other than in stations to be abandoned under the Central Agency Plans. The drag-net decision of the Court of Appeals enjoined a strike over a dispute relating to job tenure for telegraphers generally notwithstanding the narrow scope of the orders of the regulatory commissions in only two of the states involved.

## II.

**The Decision of the Court of Appeals Cannot Be Sustained on the Ground That the Labor Dispute Involved Was a "Minor" Dispute.**

Not even a colorable factual basis for the contention that what was involved in this litigation was a "minor" dispute was in existence until *after* the District Court had granted a temporary restraining order. Finding 13, R. 355. The District Court held clearly and correctly that it was a major dispute and not a minor dispute. Finding 21, R. 357, Conclusion 3, R. 358. The Court of Appeals did not reach the question, holding instead that there was no labor dispute—no dispute relating to rates of pay, rules, or working conditions—at all. The effort of the Railroad to resurrect this belated and rejected contention, not relied on by the Court of Appeals, underscores the insupportability of its opposition to the Petition for Certiorari.

## III.

**The Question as to the District Court's Jurisdiction Is a Substantial One Which Should Be Determined by This Court.**

The Respondent's position with respect to the jurisdictional issue is an evasive one, designed to obscure the importance of a fundamental question relating to the distribution of judicial power between the state and federal courts. The Respondent well knows that the fact that the question is urged here for the first time is not a reason why it should not be considered—that, in fact, such a question might well be raised by the Court on its own motion. The easy assumption that there is "power [in] the federal judicial system to achieve any necessary accommodation

of Norris-LaGuardia and other Congressional policies" (Brief in Opposition, p. 22) ignores the fact that federal jurisdiction must in the first instance be predicated on the provisions of Article III of the Constitution and the implementing Acts of Congress. The Norris-LaGuardia Act is but a further limitation of jurisdiction thus conferred.

The quotation in our petition purported to be no more than the statement by the Court of the question which it specifically left open in the *Toledo* case. *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 54-55, n. 5 (1944). The inserted reference, clearly labeled as such by the brackets, was derived from the record in that case. The complaint in *Toledo* made reference to four federal statutes, one of which was the Railway Labor Act. See Record, pp. 4, 5, 9; No. 28, O. T. 1943. In that case, as in this one, the complaint contained only a general statement that it arose under the Constitution and laws of the United States without specifying any federal statute as the basis for its claim. *Id.* at 28.

Again the facts are that the question of jurisdiction presented by that case and this one is still unresolved by this Court. The only authority relied upon by Respondent is *Brotherhood of Railroad Trainmen v. New York Central Railroad Co.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied, 355 U. S. 877 (1958). The case rested in turn on the lower court opinion in the *Toledo* case, 132 F. 2d 265, 268-270 (C. A. 7, 1942), as the basis for establishing jurisdiction. *Id.* at 121-122. As Judge, now Mr. Justice, Stewart in dissenting said at page 122:

"In my view federal jurisdiction does not exist in this case. Citizenship of the parties is not diverse. The controversy certainly does not arise under the Constitution, and I cannot perceive that it arises under the laws of the United States. Believing that the complaint should be dismissed for want of federal jurisdiction, I do not reach the merits."

Respondent has not only failed to establish any federally created right as the basis for the jurisdiction of the federal courts in its brief in opposition: it has substantially shifted to the argument that its rights derive from the State regulatory commission orders. See Brief in Opposition, pp. 9-16. No jurisdiction exists in the federal courts to entertain this action. It is important that this Court speak to that question.

**Conclusion:**

The efforts of the Respondent to obscure and minimize the seriousness of the errors of the Court of Appeals are futile. That court, by holding that no labor dispute is involved here, and that the permissive orders of two state regulatory commissions can frustrate the process of collective bargaining which is the cornerstone of national policy in the regulation of railway labor problems, has set at naught the Norris-LaGuardia Act and threatened a resurgence of all the evils of government by injunction. The writ of certiorari should be granted and the judgment reversed.

Respectfully submitted,

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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1959**

**THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,**  
*Petitioners*

**v.**

**CHICAGO AND NORTH WESTERN RAILWAY COMPANY,**  
*Respondent*

**On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**

**BRIEF OF RAILWAY LABOR EXECUTIVES'  
ASSOCIATION AS AMICUS CURIAE**

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**November, 1959**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 100

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THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,  
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v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,  
*Respondent*

---

On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

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**BRIEF OF RAILWAY LABOR EXECUTIVES'  
ASSOCIATION AS AMICUS CURIAE**

---

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition of The Order of Railroad Telegraphers, et al., that the judgment of the Court of Appeals be reversed. The consent of the attorneys for both the petitioners and the respondent has been obtained and is sub-

mitted herewith in accordance with Rule 42 of the Court's Rules.

### **THE INTEREST OF THE ASSOCIATION**

The Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., with which are affiliated twenty-three standard national and international railroad labor organizations that are the duly authorized representatives of more than 90 percent of the nation's rail employees under the Railway Labor Act. (45 U.S.C.A. 151 et seq.) The names of these individual organizations are:

American Railway Supervisors' Association

American Train Dispatchers' Association

Brotherhood of Locomotive Engineers

Brotherhood of Locomotive Firemen and  
Enginemen

Brotherhood of Maintenance of Way Employees

Brotherhood of Railroad Signalmen

Brotherhood of Railroad Trainmen

Brotherhood of Railway and Steamship Clerks,  
Freight Handlers, Express and Station  
Employees

Brotherhood Railway Carmen of America

Brotherhood of Sleeping Car Porters

Hotel & Restaurant Employees and Bartenders

International Union

International Association of Machinists

International Brotherhood of Boilermakers,  
Iron Ship Builders, Blacksmiths, Forgers  
and Helpers

International Brotherhood of Electrical Workers

International Brotherhood of Firemen & Oilers

International Organization Masters, Mates &  
Pilots of America

National Marine Engineers' Beneficial  
Association

Order of Railway Conductors and Brakemen  
 Railroad Yardmasters of America  
 Railway Employees' Department, AFL-CIO  
 Sheet Metal Workers' International Association  
 Switchmen's Union of North America  
 The Order of Railroad Telegraphers

This Court has heretofore recognized the Association as a proper party to appear and speak for these organizations and their member employees. *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al. v. United States*, 355 U.S. 141 (1957).

The Association and the individual organizations of which it is composed have a substantial interest in this case because the decision of the Court of Appeals, if left standing, will seriously restrict collective bargaining under the Railway Labor Act and will leave the employees represented by the organizations affiliated with the Association at the mercy of their railroad employers. Practically all of the individual labor organizations affiliated with the Association are parties to notices filed with railroads under the Railway Labor Act proposing agreements for the stabilization of employment similar to the notice involved in the present litigation. Moreover, the effect of the decision below is much more far sweeping than to simply forbid railway labor organizations from pursuing negotiations on such notices. The decision imposes restrictions on the commands of the Railway Labor Act that employees and carriers exert reasonable efforts to settle "all disputes" between them in conference and substitutes the Federal courts as the

arbiters of what disputes may or may not be settled by such negotiations. The decision also holds that state agencies may grant a railroad permissive authority which will bar collective bargaining under the Railway Labor Act. This constitutes a novel and disastrous limitation on the Federal statute, which substantially affects the interest of the constituent organizations of the Association and the employees they represent.

The Court in its order of October 12, 1959, granting the petition for certiorari recognized the interest of the Association and the employees represented by its constituent organizations in this case by granting the motion of the Association to file a brief *amicus curiae* in support of such petition.

### QUESTIONS PRESENTED

The petition for certiorari in this case raised eight issues affecting the validity of the Court of Appeals decision. The Association in this brief will concern itself only with three of those issues. These are:

1. Did the Court of Appeals err in holding that a railroad may properly refuse under the Railway Labor Act to confer, consider, and exert every reasonable effort to settle through collective bargaining a request by representatives of its employees for the negotiation of an agreement to stabilize the level of employment?

2. Did the Court of Appeals err in holding that the requests for such an agreement did not give rise to a "labor dispute" within the meaning of the Morris-LaGuardia Act and that such Act did not forbid the issuance of an injunction in this case?

3. Did the Court of Appeals err in holding the subject-matter of collective bargaining under the

Railway Labor Act may be limited by permissive orders of state regulatory commissions?

## SUMMARY OF ARGUMENT

### I

A. The court below held that the proposal of the petitioners was outside the scope of mandatory bargaining under the Railway Labor Act and therefore the Union could be enjoined from attempting to strike in order to require the Railroad to confer with it on this proposal. Such decision was based upon the conclusion that collective bargaining under the Railway Labor Act, where grievances or disputes concerning the interpretation or application of agreements are not involved, is limited to matters concerning "rates of pay, rules, or working conditions" and that petitioners' proposal did not fall within such classification of subject-matter. In reaching this conclusion the court below relied upon precedents under the Labor-Management Relations Act of 1947 and its own convictions as to what is good or bad for the railroad industry. The court gave no consideration to the language of the Railway Labor Act or to the legislative history of that statute. Consideration of these key factors leads to the conclusion that the court below was in error. Section 2, First and Second of the Railway Labor Act places a duty upon carriers and their employees to confer and to exert every reasonable effort to settle by voluntary negotiations in conference "*any dispute*" without limitation as to subject-matter. The language of Section 5, First of the Railway Labor Act recognizes three classes of disputes. These are (a) disputes concerning rates of pay, rules, and working conditions; (b) disputes con-

cerning grievances or the interpretation or application of agreements which are referable to the National Railroad Adjustment Board; c) any other dispute without limitation as to subject-matter. Thus, the statute in plain and unambiguous language refutes the limitations placed upon bargaining thereunder by the decision below. By well recognized rules of statutory construction, this language should be given effect, particularly since the statute is a remedial one requiring a liberal and broad construction.

B. The conclusions to be derived from the language of the Railway Labor Act are fully supported by a reference to its legislative history. The requirement of Section 2 that *all disputes* be settled, if possible, in conference between carriers and employees is derived from Section 301 of the Transportation Act of 1920. The legislative history of that Act indicates that it was intended to cover any and all disputes without limitation as to subject-matter. The report of the Conference Committee on such legislation states that it directs conferences over "*all matters of dispute*". This language was continued in Section 2 of the Railway Labor Act of 1926 and the reports of the committees of Congress on such legislation clearly show that it covers "*all disputes*" without limitation as to subject-matter. The report of the House Committee on Foreign and Interstate Commerce specifically states that the Act recognizes and covers the three classes of disputes set forth above and further states that "*all disputes must be considered first in conference*" specifically referring to the three classes outlined, which include "*all other disputes*" not embraced within the other classifications. The report of the Senate Committee on Interstate Commerce states that "*any and all disputes*" must be considered

in conference between the parties. In addition, the language of Section 5, First of the 1926 statute specifically sets forth three classes of disputes including in class (c) "all other disputes" not embraced in the other two classifications. These provisions of the Railway Labor Act remained unchanged in the amendments of 1934. The impact of this legislative history is highlighted by the fact that the 1926 Railway Labor Act was drafted by a joint management-labor committee and was presented to the Congress as providing a framework within which carriers and their employees could "settle their affairs at home and adjust all their differences between themselves".

C. The other reasons advanced by the court below in support of its decision are equally erroneous. The court stated that the present case is governed by the *Graham*, *Howard*, *Steele*, and *Tunstall* decisions and that it could "see no material difference between the *Howard* case and the case before us." It is clear that the cited cases have nothing to do with the question of whether the Railway Labor Act limits the subject-matter of collective bargaining. They merely hold that whatever the subject-matter of the bargaining may be, the representative of the employees must use its bargaining authority so as not to improperly discriminate against parts of the craft or class which it represents. The court below also based its decision in large part on its belief that it would be undesirable for the carriers in the railroad industry to be required to bargain on matters such as are contained in the petitioners' proposal for an agreement concerning the stabilization of employment. This action of the court substitutes its own judgment of what constitutes the public interest for that set forth by Congress in the statute. The legal impropriety of this substitution of

judicial judgment for the intent of Congress is given emphasis by the fact that the opinion of the court below makes no reference whatsoever to the language of Section 2 of the Railway Labor Act from which is derived the duty to bargain or to the legislative history of the Act. Thus, the two basic tenets for the interpretation of a statute, i.e., the language of the statute and its legislative history, are completely ignored by the court below in favor of an interpretation based upon its own concepts of what is good or bad for the railroad industry. This is obviously an improper basis for interpreting the scope of the Railway Labor Act. However, if there is to be judicial inquiry into such policy factors then it should include consideration of the effects which the limitation imposed by the decision below will have upon collective bargaining under that statute. There can be no doubt but that the primary purpose of Congress in enacting the statute was to avoid interruptions to interstate commerce by providing a framework of voluntary negotiation, mediation and either arbitration or fact finding to settle all disputes which might arise within the railroad industry. The decision below will substitute for this framework the long discarded principle of regulation by injunction and will place the carriers in a position where they can hinder and destroy effective collective bargaining by requiring the employee representatives to go through protracted and expensive litigation in order to even get to the conference table.

## II

Assuming *arguendo* that the duty to confer and settle disputes in conference under the Railway Labor Act, other than with respect to matters covered by

Section 3 of the statute, is limited to matters concerning "rates of pay, rules, or working conditions", petitioners' proposal to negotiate an agreement concerning stabilization of employment is within the ambit of such a classification. Petitioners' proposal specifically requested the negotiation of a "rule". This term is peculiar to the Railway Labor Act and does not appear in the National Labor Relations Act, as amended. The rules agreements between carriers and employees cover a multitude of matters which place restrictions on a carrier's common law freedom with respect to discipline, discharge, promotion, transfer, or other actions affecting employees or their jobs. Such rules have also embraced agreements relating to stabilization of employment, including agreement to preserve existing levels of employment against changes arising out of installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, and relocation of maintenance and repair work. While the court below states a correct general principle of law that the provisions of the statute cannot be changed by existing agreements, such principle has no application in this case. The existence of such agreements is clear evidence of the manner in which the statute has been applied within the industry and should be given appropriate weight in the interpretation of the particular statutory language here discussed.

The court below based its decision that the petitioners' proposal was not included within the language "rates of pay, rules, or working conditions" in large measure on its belief that technological change in the railroad industry would be retarded if carriers were

required to confer and bargain about such matters. However, this Court has recognized that the normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce requests for negotiation of agreements relating to the use of labor saving devices which will displace members. In addition, the many decisions of the courts dealing with the phrase "working conditions" clearly indicate that petitioners' proposal is a proper one for collective bargaining.

### III

The decision below also holds that the proposal of the petitioners for the negotiation of an agreement concerning stabilization of employment does not give rise to a "labor dispute" within the meaning of the Norris-LaGuardia Act so that the prohibitions of that statute against injunctions by Federal courts in labor disputes is not applicable. However, the decisions of this Court relating to the scope of the Norris-LaGuardia Act make clear that "labor disputes" thereunder are not limited to matters such as wages, hours, unionization or betterment of working conditions, but rather the term must be given a broad and liberal interpretation in light of the purposes of the statute. This construction of the Norris-LaGuardia Act, when considered in conjunction with the factors bearing upon the scope of the term "rules or working conditions" as used in the Railway Labor Act, clearly reveals that petitioners' proposal gave rise to a "labor dispute" within the meaning of the former statute so that the Federal courts are prohibited from enjoining a strike to induce bargaining upon that proposal.

## IV

The decision below holds in substance that the field of bargaining under the Railway Labor Act may be limited by decisions of state regulatory commissions granting a carrier's petition for authority to make changes in its operations. Not only do the commissions here involved disclaim an intent to interfere with bargaining under that Act, but the decision of this Court in *California v. Taylor*, 353 U.S. 533, as well as other judicial decisions, makes clear that the Railway Labor Act is supreme in the area covered by the statute and that the duties and obligations imposed by it upon carriers and employees cannot be limited by the principle of state sovereignty.

## ARGUMENT

## I

**THE RAILWAY LABOR ACT REQUIRES A CARRIER TO CONSIDER, CONFER UPON, AND TO MAKE EVERY REASONABLE EFFORT TO SETTLE BY NEGOTIATIONS ALL DISPUTES, WITHOUT LIMITATION AS TO SUBJECT-MATTER, WHICH MAY ARISE WITH ITS EMPLOYEES.**

**A. The plain unambiguous language of the statute requires a carrier and its employees to exert every reasonable effort to settle any dispute by negotiation without limitation as to subject-matter**

The Court of Appeals held that the issue in this case is whether the request of The Order of Railroad Telegraphers (hereinafter called "the Union") to the Chicago & North Western Railway (hereinafter called "the Railroad") for the negotiation of an agreement relating to the level of employment of crafts or classes of the carrier's employees represented by the Union is within the scope of mandatory bargaining under the Railway Labor Act. It further held that the answer to this issue depended upon whether such a request pertains to "rates of pay, rules, or working conditions". The court concluded that the

request was not embraced within such classification of subject-matter and thus was not within the scope of mandatory bargaining under the governing statute. The carrier was therefore not required to negotiate with respect to this request and the Union could be enjoined from striking to require such negotiations (R. 382-384).

The Court of Appeals reached these conclusions upon the basis of decisions relating to the interpretations of the Labor-Management Relations Act of 1947 (29 U.S.C.A. 141 et seq.) and without reference to the provisions of the Railway Labor Act (45 U.S.C.A. 151 et seq.) which governs labor relations in the railroad industry.<sup>1</sup> A review of the language of the Railway Labor Act clearly reveals that there is no limitation upon collective bargaining under that statute and that the holding of the Court of Appeals is in error.

Section 2 of the Railway Labor Act (45 U.S.C.A. 152) sets forth certain general duties of carriers and employees under the statute. The first two paragraphs of this Section place a specific duty upon carriers and employees to settle all disputes between them in the following language:

*"General duties—Duty of carriers and employees to settle disputes"*

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agree-

<sup>1</sup> Although the Court of Appeals stated (R. 382) that this Court had put limitations on the scope of bargaining under the Railway Labor Act, it cites only a decision under the Labor-Management Relations Act for this proposition.

ments concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (Emphasis supplied)

*"Consideration of disputes by representatives"*

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Emphasis supplied)

Thus, the statute in plain and unambiguous language requires a carrier to confer and consider in good faith with representatives of its employees all matters of dispute between them and to exert every reasonable effort to settle such disputes without any limitation as to the subject matter involved. The purpose of this broad requirement is stated by the statute to be the avoidance of any interruption to commerce or to the operations of a carrier. The decision of the Court of Appeals places a limitation upon this plain language of the statute and in effect says that carriers and employees are required by it to confer and exert every reasonable effort to settle only disputes concerning "wages, rules, or working conditions" as those terms may be defined by the courts. This action is contrary to the long-established principle of statutory construction that courts follow the clear language of statutes. This principle was

stated by this Court as follows in *United States v. Public Utilities Commission*, 345 U.S. 295, 315 (1953):

“Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075; *Feres v. United States*, 340 US 135, 95 L ed 152, 71 S Ct 153; *International L. & W. Union v. Juneau Spruce Corp.*, 342 US 237, 243, 96 L ed 275, 280, 72 S Ct 235; *Johansen v. United States*, 343 US 427, 432, 96 L ed 1051, 72 S Ct 849.”

Here both the language of the statute and the purpose of Congress in using that language (i.e. to avoid interruptions to commerce) are unequivocally clear. The decision of the Court of Appeals thus constituted an unwarranted limitation upon the statutory language. This is particularly true since the Railway Labor Act is remedial in nature and should be broadly and liberally construed to accomplish the purposes it was designed to meet as thus set forth in Section 2, *Nashville, C. St. L. Ry. v. Railway Employees' Dept., etc.*, 93 F. 2d 340, 342 (6th Cir., 1937), *cert. den.* 303 U.S. 649; *Black v. Magnolia Liquor Co.*, 355 U.S. 24 (1957). In the latter case this Court stated as follows on this point: (355 U.S. at 26)

“But we deal here with remedial legislation whose language should be given hospitable scope.”

These conclusions as to the scope of the language of Section 2, First and Second, are enforced by reference to the provisions of the fifth paragraph of that Section as contained in the 1934 statute which was subsequently revised by the provisions of paragraph eleven enacted in 1951. Section 2, Fifth as it was adopted in the 1934 statute reads as follows:

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

The fact that Congress felt it necessary to put a specific limitation in the 1934 statute covering so-called "yellow dog" contracts and "union shop" agreements is clearly indicative of the fact that Congress intended and understood that the provisions of the first two paragraphs were all-inclusive. This provision further demonstrates that when Congress wished to put any limitation upon the provisions of the first two paragraphs of that Section it specifically did so.<sup>2</sup>

The decision below gives no evidence that any consideration was given to the provisions of Section 2 of the Railway Labor Act which defines the duty of carriers and employees to bargain. It is apparent that the Court of Appeals considered this duty (outside of disputes arising under Section 3) as only co-extensive with the provisions of Section 6 (45 U.S.C.A.

<sup>2</sup>The prohibition against union shop agreements was removed in 1951 by Section 2, Eleventh.

156) relating to proposed changes in agreements "affecting rates of pay, rules, or working conditions". (R. 382) However, a reference to Section 5 of the statute (45 U.S.C.A. 155) clearly reveals that Section 6 cannot be read as a limitation upon the subject-matter embraced within the duty to bargain found in Section 2, First and Second.

The first paragraph of Section 5 reads in pertinent part as follows:

*"Functions of Mediation Board—Disputes within jurisdiction of Mediation Board"*

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) *Any other dispute not referable to the National Railroad Adjustment Board* and not adjusted in conference between the parties or where conferences are refused." (Emphasis supplied).

This paragraph thus recognizes three separate classes of disputes which may arise between a carrier and its employees with respect to two of which either may invoke the services of the Board. These are (1) disputes concerning rates of pay, rules, or working conditions; (2) disputes concerning the interpretation or application of agreements which are referable to the National Railroad Adjustment Board; (3) *any other dispute*. No limitation as to subject-matter is placed upon this third classification of disputes.

These conclusions drawn from the language of Sections 2 and 5 of the Railway Labor Act are further supported by reference to provisions of Section 7 (45 U.S.C.A. 157) providing for voluntary arbitration of disputes. Section 5, First of the statute provides that if the National Mediation Board is unable to bring about an amicable settlement through mediation of any dispute before it, which as shown above includes any dispute not referable to an adjustment board, it shall endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of Section 7. The first paragraph of that Section contains the following language defining the matters which may be submitted to arbitration thereunder:

“First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.”

As can be seen, the language of the Section is all-inclusive and does not contain any limitation as to the subject-matter which may be arbitrated except that it shall involve a controversy which has not been settled in conference between the parties, by an adjustment board or through mediation.

The Court of Appeals therefore clearly erred when it held that the request of the Union was not a proper subject for bargaining under the Railway Labor Act because it did not involve rates of "pay, rules, or working conditions". The statute by its own language contemplates valid disputes not falling within this classification with respect to which the parties are required to confer and make every reasonable effort to settle. It makes no difference under the Railway Labor Act whether the dispute concerns "rates of pay, rules, or working conditions" or some subject-matter not embraced by those terms. In either case the duty of bargaining rests on the carrier and its employees.

The decision below also proceeded from an assumption that the scope of bargaining under the Railway Labor Act is the same as that under the Labor-Management Relations Act of 1947. (R. 382) However, an examination of the language of the latter statute clearly shows that it differs from the Railway Labor Act with respect to such matters. The requirement of collective bargaining in the Labor-Management Relations Act of 1947 is based on provisions in Sections 8 and 9 thereof. Section 8(a)(5) and (d)<sup>3</sup> makes it an "unfair labor practice" for an employer to refuse to bargain collectively with representatives of his employees with respect to "wages, hours, and other terms and conditions of employment" subject to the provisions of Section 9(a).<sup>4</sup> The latter Section in turn makes the representatives selected by a majority of employees in an appropriate unit the exclusive representative for bargaining in respect to such matters. Whatever may be the correct interpretation

<sup>3</sup> 29 U.S.C.A. 158(a)(5) and (d).

<sup>4</sup> 29 U.S.C.A. 159(a).

of these provisions, the Labor-Management Relations Act of 1947 does not contain the specific all-inclusive directive laid down by Congress in Section 2 of the Railway Labor Act requiring carriers and employees to confer, consider, and exert every reasonable effort to settle "all disputes". The need to avoid interruptions to the instruments of commerce, as set forth by Congress in the Railway Labor Act, and the recognition of the differences between the rail and air transport industries on the one hand and other types of industry has led Congress to set up a statute to govern labor-management relations in the transport industries that differs completely in concept and method from that employed to regulate such relations in other industries. *Brotherhood of Railroad Trainmen v. Chicago, River & Indiana R. Co.*, 353 U.S. 30, 31-32, N. 2. (1957)

The Railway Labor Act must therefore be taken as meaning what it says when it directs carriers and employees to exert every reasonable effort to settle through negotiations all disputes arising between them and not just some disputes as the Court of Appeals has held.

**B. The legislative history of the Railway Labor Act reveals that Congress intended to embrace all disputes, without limitation as to subject-matter, in the requirements that carriers and their employees make every reasonable effort to settle differences by negotiation**

The legislative history of the regulation of labor-management relations in the railroad industry is the story of a fifty-year search by Congress to devise an ever broadening framework to settle disputes within that industry leading to interruptions of interstate commerce. This search begins with the Act of October 1, 1888 (25 Stat. 501) providing for the

voluntary arbitration of "differences or controversies", which might hinder, impede, obstruct, interrupt, or affect the transportation of passengers or property and culminates with the passage of the Railway Labor Act of 1934 (45 U.S.C.A. 151 et seq.) which provided for the settlement through the processes of negotiation, mediation, and voluntary arbitration of *all disputes* other than grievances or disputes growing out of the interpretation or application of agreements and for the compulsory arbitration of the latter type of dispute if a negotiated settlement fails. In between successive legislative enactments have filled in the gaps.

The Erdman Act of June 1, 1898 (30 Stat. 424) employed the phrase "wages, hours, and conditions of employment", and provided for the Chairman of the Interstate Commerce Commission and the Commissioner of Labor to intervene and in substance mediate controversies concerning such matters. This statute also provided for voluntary arbitration.

The Newlands Act of July 15, 1913 (38 Stat. 103) continued the basic framework of the Erdman Act, but provided for a Board of Mediation and Conciliation to mediate controversies "concerning wages, hours of labor, or conditions of employment." This statute continued the traditional voluntary arbitration procedures.

The language of Section 2 of the present Railway Labor Act making it the duty of carriers and employees to negotiate with respect to "all disputes", without limitation as to subject-matter, first appeared in Section 301 of H.R. 10453, which was introduced in 1919 before the 66th Congress, 1st Session, as part of a proposed new transportation act removing railroads from war time government ownerships. The Senate

bill, S. 3288, 66th Congress, 1st Session, did not contain any comparable provision. The ultimate bill adopted, which became Section 301 of Part III of the Transportation Act of 1920 (41 Stat. 456) reads as follows:

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of *any dispute* between the carrier and the employees or subordinate officials thereof. *All such disputes* shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or the subordinate officials thereof, directly interested in the dispute. If *any dispute* is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." (Emphasis supplied)

The Conference Report on this legislation (Rept. 650, 66th Congress, 1st Session, dated February 18, 1920) leaves no doubt that this provision was intended to place a duty upon carriers and employees to negotiate out any dispute without limitation as to subject-matter. At page 60 of that Report, the Conference Committee states:

"The House bill makes it the duty of carriers and their employees to take *all possible means* to adjust their differences in the first instance before referring any dispute to any adjustment board. The Senate amendment had no provision upon this subject. The conference bill contains a declaration, similar to that in the House bill, directing the officials of a carrier and their

employees to appoint representatives to confer over *all matters of dispute.*" (Emphasis supplied)

The phrase "all matters", as used to refer to the statutory language "any dispute", cannot possibly be interpreted to mean that there was a limitation upon the subject-matter concerning which carriers and their employees were permitted and intended to negotiate.

This conclusion is also borne out by the Conference Report on the provisions of Title III of the 1920 statute. This report points out at page 59 that the House bill provided for adjustment boards which were authorized "to receive disputes of any kind for consideration" submitted to them. This was in keeping with the House bill which placed a duty in the first instance upon all carriers and employees to exert every reasonable effort to settle "any dispute" between them by conference. The Report also points out (page 59) that the Senate bill, which did not require negotiation of disputes, "divided disputes into two classes, those relating to wages and working conditions and those relating to grievances and matters of discipline." Regional adjustment boards were provided for settlement of the latter class of dispute, while a system of wage committees and a Labor Board were set up to decide wage disputes.

The final bill as adopted retained the House concept of a duty to negotiate upon "all disputes" and provided a compromise version of the Senate bill with respect to adjustment boards. Instead of authority to consider disputes of "any kind" submitted to them, such boards were limited to disputes "involving only grievances, rules, or working conditions", not decided in conference. A Labor Board was set up to review,

upon petition or its own motion, wage agreements voluntarily negotiated and disputes certified by adjustment boards likely to substantially interrupt commerce or disputes in cases where an appropriate adjustment board had not been organized.

The concept of a duty upon carriers and employees to confer upon and make every reasonable effort to settle "any dispute", without limitation as to subject-matter, has continued down to the present time. Statutory changes have related solely to the procedures with respect to government intervention when negotiations fail.

Thus, Section 2, First and Second of the Railway Labor Act of 1926 (44 Stat. 577) laid down a duty of collective bargaining in language identical to that presently found in such Section of the Act. This language, except for the first sentence of Section 2, First is substantially the same as that found in Section 301 of Title III of the Transportation Act of 1926. Sections 5, 6, 7, and 10 of the 1926 statute also set up in their present form the basic system of mediation, voluntary arbitration, and/or fact finding by Presidential Emergency Boards where collective bargaining fails to settle a dispute. Section 6 also appeared for the first time to prevent changes in existing agreements concerning wages, hours, and working conditions except as there provided. Section 3 also provided for adjustment boards to entertain and act upon disputes arising out of grievances or out of the interpretation or application of agreements, but made the organization of these boards a matter of agreement between the parties.

The reading together of Section 2, First and Second and Section 5, First of the 1926 statute makes

clear that the statute contemplated (1) a duty upon carriers and employees to confer upon and exert every reasonable effort to settle in conference "all disputes", without limitation as to subject-matter, (2) mediation through the auspices of the National Mediation Board of "all disputes", without limitation as to subject-matter, not settled in conference,<sup>5</sup> and (3) finally arbitration and/or emergency board fact finding with respect to such disputes.

Section 2, First and Second of the 1926 Act read the same as such section in the present Act quoted above at page 12. Section 5, First of the 1926 Act read as follows:

"Section 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the board of mediation created by this Act, or the board of mediation may proffer its services, in any of the following cases:

"(a) a dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

"(b) a dispute which is not settled in conference between the parties in respect to changes in rates of pay, rules, or working conditions;

"(c) *any other dispute* not decided in conference between the parties." (Emphasis supplied)

<sup>5</sup> If the dispute involved a grievance or grew out of the interpretation or application of an agreement and had been referred to an adjustment board, it was removed from the class of disputes covered by Section 5, First of the 1926 Act.

Any shred of doubt that could exist as to the scope of bargaining existing under the 1926 Act is removed by the Report of the House Committee on Foreign and Interstate Commerce on H. R. 9463, which became the Railway Labor Act of 1926. This Report (No. 328, 69th Cong., 1st Sess., dated February 19, 1926) read in pertinent part as follows: (page 3)

"The bill provides in brief as follows:

"(1) It is made the duty of all railroad managers and employees to exert every reasonable effort to make and maintain agreements.

"(2) *All disputes* shall be considered first in conference between representatives designated and authorized so to confer respectively by the carrier and by the employees thereof interested in the dispute.

"(3) Representatives shall be designated in such manner as the parties themselves shall determine 'without interference, influence, or coercion exercised by either party of the self-organization or designation of representatives by the other.'

"(4) Disputes between employers and employees are divided into *three classes*:

"(a) disputes over grievances or the interpretation or application of agreements;

"(b) disputes over proposed changes in agreements concerning rates of pay, rules, and working conditions;

"(c) *all other disputes*.

"(5) *All disputes must be considered first in conference*, but if not settled in conference disputes in class *b* and *c* are considered directly by the Government board of mediation. Disputes in class *a*, if not settled in conference must be referred to an adjustment board and

are only considered by the board of mediation if not decided by the adjustment board.  
(Emphasis supplied)

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- “(8) A board of mediation is created composed of five members appointed by the President by and with the advice and consent of the Senate, with the duty to intervene at the request of either party or on its own motion in any unsettled dispute, whether it be a (class *a*) dispute not decided in conference or by the appropriate adjustment board or a dispute over changes in rates of pay, rules, and working conditions (class *b*) or any other dispute (class *c*) not settled in conference.” (Emphasis supplied)

The Report of the Senate Committee on Interstate Commerce considering H. R. 9463 (Rept. No. 606, 69th Cong., 1st Sess., dated April 16, 1926)<sup>6</sup> is not as detailed as the House report, but it too makes crystal clear the unlimited nature of the duty imposed by Section 2. This report states in pertinent part as follows: (page 1)

“Briefly stated, the bill provides—

“First. That it shall be the duty of the parties to exert every reasonable effort to make and maintain agreements.

“Second. *That any and all* disputes shall first be considered in conference between the parties directly interested. (Emphasis supplied)

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<sup>6</sup> The report of this Committee on S. 2306, a bill identical to H.R. 9463, made to the Senate on February 26, 1926 (Rept. No. 222, 69th Cong., 1st Sess.) reads the same as the quoted statements from Report No. 606.

"Fourth. A board of mediation is created to consist of five members appointed by the President by and with the advice and consent of the Senate none of whom shall be in the employ of or pecuniarily or otherwise interested in any organization or employ of any carrier. The duty is imposed on this board of mediation to intervene at the request of either party or on its own motion, in *any unsettled labor dispute*, whether it be a grievance, or a difference as to the interpretation or application of agreements not decided in conference or by the appropriate adjustment board, or a dispute over changes in the rates of pay, rules or working conditions not adjusted in conference between the parties. If it is unable to bring about an amicable adjustment between the parties it is required to make every effort to induce them to consent to arbitration." (Emphasis supplied)

It is hardly possible to find words in the English language more unqualified than the phrase "*any and all disputes*" used by the Senate Committee in describing the duty of carriers and employees under the statute to bargain out their differences.

The impact of these statements read in conjunction with the language of the 1926 Act is increased by the fact that the legislation was drafted and presented by a joint committee of management-labor executives appointed by the President. This fact is set forth in the House Committee Report as follows: (page 1)

"The bill was introduced as the product of negotiations and conferences between a representative committee of railroad presidents and a representative committee of railroad labor organization executives, extending over several months, which were concluded with the approval of the bill, respectively, by the Association of Railway Executives

and by the executives of 20 railroad labor organizations. As introduced it represented the agreement of railway managements operating over 80% of the railroad mileage and labor organizations representing an overwhelming majority of the railroad employees."

Thus, both the language of the Railway Labor Act of 1926 and the description of its effects by the Committees of Congress clearly show that the statute placed a duty upon carriers and employees to negotiate together with respect to *any* dispute arising between them, without limitation as to subject-matter.

The final step in this legislative development was the Railway Labor Act of 1934 (45 U.S.C.A. 151 et seq.) which is the basic statute which still governs labor relations in the railroad industry.<sup>7</sup> This statute retained Section 2, First and Second in the identical language used in the Railway Labor Act of 1926. Since the 1934 statute set up adjustment boards, instead of leaving the organization of such boards to the parties as did the 1926 Act, and conferred jurisdiction on such boards to entertain grievances and disputes arising out of the interpretation or application of agreements, it was necessary to reword Section 5 concerning the functions of the National Mediation Board. However, in rewording the language of Section 5, First Congress clearly retained the concept that carriers and employees should negotiate with respect to any dispute, without limitation of subject-matter, and that

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<sup>7</sup> The amendments to the Railway Labor Act that have been made since 1934 have not affected the scope of collective bargaining under that statute except that the 1951 amendment to Section 2, Eleventh makes lawful union shop agreements specifically invalidated by the 1934 statute. See *supra*, page 15.

if they were unable to reach agreement, the dispute should be mediated and arbitrated or subjected to fact finding if it was not the type referable to an adjustment board.

This is shown in the language of Section 5, First (b) which recognizes and provides for the mediation of disputes in addition to those concerning changes in rates of pay, rules, and working conditions covered by paragraph (a) and embraced within the category of "any other dispute not referable to the National Railroad Adjustment Board".<sup>8</sup>

Thus, the Court of Appeals had no basis either in the language of the statute or in its legislative history (which is not mentioned in the court's opinion) for limiting the subject-matter of disputes with respect to which the carriers and employees are required to confer exert reasonable effort to settle in conference under the Railway Labor Act.

**C. The reasons advanced by the court below as grounds for limiting collective bargaining under the Railway Labor Act are either irrelevant or involve misapplications of this Court's decisions**

The Court of Appeals advanced two reasons in support of its conclusion that the subject-matter of the petitioners' request was outside the scope of collective bargaining under the Railway Labor Act. Neither of these reasons has any legal validity.

First, the court below stated in substance that this Court had restricted the area of collective bargaining

<sup>8</sup> This is also shown by the statement in the Report of the House Committee on Interstate and Foreign Commerce (Report No. 1944, 73rd Cong., 2nd Sess., dated June 11, 1934) with reference to Section 2 that "The bill does not introduce any new principles into the existing Railway Labor Act \* \* \*."

under the Railway Labor Act in the *Graham, Howard, Steele* and *Tunstall* decisions and that it could "see no material difference between the *Howard* case and the case before us." (R. 384) This application of the cited cases to the present problem is clearly erroneous.

The cited cases did not limit the subject-matter of collective bargaining under the Railway Labor Act. Instead, they hold in substance that, whatever the subject-matter of the bargaining may be, the duly certified representatives of the employees must use its bargaining authority so as not to improperly discriminate against parts of the craft or class represented. The particular discrimination involved in the cited cases related to race. The cases obviously have nothing to do with the question of whether the Railway Labor Act limits the subject-matter of collective bargaining.

Second, the Court of Appeals held that it would be undesirable for the railroad industry if carriers were required to bargain on matters like that set forth in petitioners' request to the railroad. (R. 382-383) The court's opinion indicates that this was the most important factor affecting its decision. In short, the court below was simply determining the future course of collective bargaining in the railroad industry upon the basis of its judgment as to what is good or bad for the industry. It does not require argument to support the proposition that such a consideration is wholly irrelevant in this case.

Obviously, the only proper course of judicial inquiry is an investigation of what Congress intended in its adoption of the Railway Labor Act. Such an inquiry involves an examination of the language of the statute

and the legislative history of that language. In spite of the obvious nature of this fact, the court below does not mention the language of the Railway Labor Act, except a passing reference to Section 6 (R. 382), and gives no consideration at all to the lengthy legislative history cited above. Instead, the court weighs the problem almost entirely in the context of its own thinking as to what is desirable for the industry. This type of judicial inquiry was recently rejected by this Court in *United Steelworkers of America v. United States* (Case No. 504, decided November 7, 1959). In its decision in that case, this Court stated:<sup>9</sup>

"The arguments of the parties here and in the lower courts have addressed themselves in considerable part to the propriety of the District Court's exercising its equitable jurisdiction to enjoin the strike in question once the findings set forth above had been made. These arguments have ranged widely into broad issues of national labor policy, the availability of other remedies to the executive, the effect of a labor injunction on the collective bargaining process, consideration of the conduct of the parties to the labor dispute in their negotiations, and conjecture as to the course of those negotiations in the future. We do not believe that Congress in passing the statute intended that the issuance of injunctions should depend upon judicial inquiries of this nature. Congress was not concerned with the merits of the parties' positions or the conduct of their negotiations. Its basic purpose seems to have been to see that vital production should be resumed or continued for a time while further efforts were made to settle the dispute. To carry out its purposes, Congress carefully surrounded the injunction proceedings with

<sup>9</sup> Page 3 of opinion as reported in Labor Relations Reporter, November 9, 1959, Vol. 45, No. 3 (45 LRRM 2044 et seq.).

detailed procedural devices and limitations. The public report of a board of inquiry, the exercise of political and executive responsibility personally by the President in directing the commencement of injunction proceedings, the statutory provisions looking toward an adjustment of the dispute during the injunction's pendency, and the limited duration of the injunction, represent a congressional determination of policy factors involved in the difficult problem of national emergency strikes. This congressional determination of the policy factors is of course binding on the courts."

These words are clearly applicable to the decision of the Court of Appeals in this case. Congress has clearly stated its purpose of requiring carriers and employees to confer and settle, if possible, by collective bargaining "all disputes", in order to avoid interruptions to interstate commerce. In order to carry out this purpose, Congress has laid down detailed procedural devices including mediation, arbitration, the public report of a board of inquiry, and the exercise of executive responsibility by the President. "This congressional determination of the policy factors is of course binding on the courts."

However, if there is to be judicial inquiry into policy factors then it should not stop short as does that of the court below.

The history of congressional consideration of labor matters in the railroad field for the past forty years is replete with the concept of the desirability in the public interest of peaceable settlement of controversies between labor and management across the conference table. The entire framework of the Railway Labor Act is built around this principal consideration. This purpose of the proposed legislation pre-

sented to Congress in 1926 as the joint product of railroad management and labor was fully expressed by Mr. Patrick E. Crowley, then President of the New York Central Railroad, to the Senate Committee in the following statement:<sup>10</sup>

"Mr. Crowley: Mr. Chairman and Gentlemen of the Committee, I do not think there is much for me to say. Mr. Willard has covered the case fully.

"This bill before you, as Mr. Willard has explained in full, is one that has been agreed to by the representatives of the railroads and the employees of the railroads, and I hope you will give it favorable consideration.

"Fundamentally it provides that the railways and the employees will settle their affairs at home and adjust all their differences between themselves, and if we can do that we can get along better . . .

"This is the first time, I believe, that railroad labor and the railroad officers have come before you in an agreement. The bill provides that we shall settle our affairs at home; failing to do so it provides ways and means that we can dispose of any controversies that are not settled locally. It is, in large measure, an assurance to the public that they will not have strikes and interruption of railroad transportation and I hope you will give us an opportunity to try it out."

The validity of this principle has been proved by the minimum of major strikes within the industry under the Railway Labor Act. Yet, the decision of the Court of Appeals would take a long step forward toward destroying this principle and paralyzing collective bar-

<sup>10</sup> Hearings before Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., on S. 2306, January 25, February 1, 8, 10, 1926.

gaining in the industry. Instead of conferences on "all disputes" and negotiated settlements, as provided by the Railway Labor Act, there will be substituted extensive and expensive court litigation to determine whether in the judgment of the Federal courts it is desirable for the industry to have labor and management confer about a particular subject-matter. Armed with the weapon of such a decision, carriers will simply refuse to confer whenever they find it embarrassing or otherwise inconvenient to do so and labor's only recourse will be protracted litigation in order to even get to the conference table. The Court of Appeals clearly lost sight of the fact that the threatened strike in this case was not to force an agreement, but simply to obtain the acquiescence of the carrier in conferring and thus setting in motion the machinery of the Railway Labor Act for a peaceable resolution of the interests involved. The decision below prevents this and in effect restores the conduct of labor-management relations to the long discarded principle of regulation by injunction. This Association cannot believe that such a result is in the public interest or was ever intended by a Congress that, in adopting the Railway Labor Act, accepted the professions of railroad management that it enabled labor and management to "settle our affairs at home".

Consequently, regardless of the meaning ascribed to "rates of pay, rules, and working conditions" as used in Section 6, the request of the petitioners to the Railroad was a valid one, the carrier violated the statute in refusing to confer and negotiate or mediate with respect to the merits thereof (R. 352, 353) and make every reasonable effort to settle it through such conferences with petitioners or in mediation. Such being the case, petitioners acted within the law in threatening to

strike and the injunction directed by the Court of Appeals (R. 385) was unlawful.

## II

### THE SUBJECT-MATTER OF PETITIONERS' REQUEST CONCERNED RATES OF PAY, RULES, OR WORKING CONDITIONS AS THAT PHRASE IS USED IN THE RAILWAY LABOR ACT

Assuming *arguendo* that the duty to confer and settle disputes in conferences under the Railway Labor Act, other than with respect to matters covered by Section 3 of that statute, is limited to matters concerning "rates of pay, rules, or working conditions", petitioners' proposal of December 23, 1957 (R. 352) falls within such a classification.

The decision below cites the court's prior (1945) decision *In re Chicago North Shore and M. R. Co.*, 147 F. 2d 723, 727, *cert. den.* 325 U.S. 852, in support of its conclusion that the subject-matter of the proposal of the petitioners to the Railroad did not concern "rates of pay, rules, or working conditions" as that language is used in the Railway Labor Act. (R. 385) In that opinion at the page cited (page 727) the Court of Appeals expressed in general terms a view as to the meaning of the phrase "working conditions" as that phrase appears in Section 6 of the Railway Labor Act. However, the proposal of the petitioners was to amend the current agreement between them and the Railroad "by adding a rule" relating to the abolition or discontinuance of positions covered by the agreement. (R. 352) Thus, the question involved is not whether the proposal relates to "working conditions", but whether it properly concerns "rules", as that term is used in the Railway Labor Act, a question upon which the *North Shore* case has no bearing. Although many "rules" might be said to also constitute "working conditions", it is

obvious that the term "rule" has a meaning not entirely embraced by the phrase "working conditions", since they are separated in the statute both by the conjunctive "and" as well as the disjunctive "or".<sup>11</sup>

The term "rules" is not defined by the statute. It should be broadly and liberally construed to accomplish the purposes of the statute. *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 55 (10th Cir., 1956). Such purpose is stated as follows by this Court in *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950) at page 242:

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' 48 Stat. 1186, ch 691, (§ 2), 45 USCA § 151a, FCA title 45, § 151a. This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. See *Elgin, J. & E. R. Co. v. Burley*, 325 US 711, 722, 89 L ed 1886, 1894, 65 S Ct 1282. The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. *Carriers are therefore required to negotiate with bargaining representatives of the employees.* *Virginian R. Co. v. System Federation*, R. E. D. 300 US 515, 547, 548, 81 L ed 789, 799, 800, 57 S Ct 592. The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail." (Emphasis supplied)

This court has also recognized that the fair and equitable treatment of employees in relation to

<sup>11</sup> The conjunctive "and" appears in Section 2, First, and the disjunctive "or" in Section 2, Sixth and Seventh, Section 5, First and Section 6.

changes in railroad operations has an important bearing upon the accomplishment of this purpose.

*United States v. Lowden*, 308 U.S. 225 (1939). In that case this Court stated: (308 U.S. at 234-236)

"One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system."

"The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored."

The statutory use of the word "rules", with reference to types of agreements is peculiar to the Railway Labor Act, no similar term being found in the National Labor Relations Act, as amended. It grows out of the terminology and customs of the industry. Rule agreements in the industry cover a multitude of subjects which place restrictions on a carrier's common law freedom with respect to discipline, discharge, promotion, transfer or other actions affecting employees or their jobs. All of these "rules" place some veto over management's freedom to pursue its own judgment in a carrier's operations.

An example of a "rule", which is akin in principle and substance to the proposed rule here involved, is found in the existing collective bargaining agreement between the Brotherhood of Railway and Steamship Clerks and Railway Express Agency, dated June 1, 1949. Rule 22 of this agreement provides in pertinent part:<sup>12</sup>

"Positions or work involving a position may be transferred from one seniority district to another after conference and agreement between the management and the duly accredited representatives of the employees \* \* \*"

It is but a short step between an agreement concerning transfer of jobs from one geographical location to another and one relating to abolition of jobs.

But whether the proposal of the petitioners be examined in terms of "rules" or "working conditions" it is clearly a valid subject of bargaining in the railroad industry.

Labor and management in the industry have long believed it proper to concern themselves with agreements dealing with operational changes which can adversely affect employees.

One of the oldest existing agreements between employees and carriers dealing with the "abolition" of "discontinuance" of jobs is the "Agreement of May, 1936, Washington, D. C." popularly known as the "Washington Job Protection Agreement", which restricts the freedom of the carrier signatories to abolish jobs through coordinations. Section 5 of that agreement reads as follows:

<sup>12</sup> All collective bargaining agreements are a part of the official records of the National Mediation Board.

"Section 5. Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved *on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto.* In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13." (Emphasis supplied)

In addition, this agreement provides for various monetary compensations to employees displaced or dismissed in a coordination. Practically the entire railroad industry on both the labor and management sides is party to this agreement, including the Railroad respondent. The agreement itself is cited by this Court in the Lowden case. (308 U.S. at p. 234)

Thus, almost the whole of the railroad industry, including respondent, is party to an agreement which restricts the freedom of the employer with respect to his freedom of action in abolishing and reassigning jobs.

In addition to the many existing contracts in the railroad field relating to stabilization of employment cited by petitioners and referred to in the decision below (R. 383) this Court's attention is directed to an agreement signed on June 18, 1959, between the Norfolk & Western Railway Company, The Virginian Railway Company and the Association on behalf of its constituent organizations, which contains the following provisions in paragraph 1(a) thereof:<sup>13</sup>

<sup>13</sup> This agreement is a part of the official records of the Interstate Commerce Commission in Finance Docket No. 20599.

“(a) On the effective date of the said merger, the Norfolk & Western will take into its employment all employees of the Virginian who are willing to accept such employment, and none of the present employees of either of said carriers shall be deprived of employment or placed in a worse position with respect to compensation at any time during his employment because of the merger of the said railroads or any program of economies undertaken by the Norfolk & Western because of the merger including, but not specifically limited to, installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, relocation of maintenance and repair work, changes in any existing work now performed on the Norfolk & Western or Virginian pursuant to existing agreements, changes pursuant to any integration of employment forces, or other such economies or changes resulting from the merger; provided, however, that all presently working employees of the Virginian and the Norfolk & Western shall be entitled to the foregoing preservation of employment and, provided further, that in the event that the employee organizations at their option elect not to have presently working employees of either railroad occupy available positions on the merged railroad through integration of seniority rosters without liability to furloughed employees who may be affected by such integration of seniority rosters, then, in that event, said employees shall be entitled only to compensatory benefits and other protection afforded by the terms of the Washington Job Protection Agreement in lieu of preservation of their employment;” (Emphasis supplied).

This agreement covering “preservation of employment” has been accepted by the Commission (Division 4) in its report and order of October 13, 1959, approving the merger of the Norfolk & Western and The

Virginian as satisfying the requirements of Section 5(2)(f) of the Interstate Commerce Act. (49 U.S.C.A. 5(2)(f)) No one has suggested or found present the evil consequences envisioned by the Court of Appeals from such an agreement. Indeed, the Commission found the merger with the agreement to be in the public interest and as greatly productive of efficiencies and economies in the industry.<sup>14</sup>

The Court of Appeals noted that there may be agreements in the industry covering the same or similar subject-matter. However, it concluded that this did not change the legal character of such proposals. (R. 384) As a general statement of a legal principle this is, of course, true, but has no application to a situation where custom and usage have a substantial bearing upon the meaning of a particular statutory term.

The court below held in part at least that the proposal of petitioners was invalid because it would enable the Union to control the pace of the Railroad's response to technological developments. (R. 383) This and the other consequences envisioned by the court below involve sheer speculation and are clearly outside of the scope of judicial inquiry in this case. *Supra*, page 30. Moreover, this Court has recognized as a valid labor objective agreements protecting employees against the course of technological change as does the Norfolk & Western agreement cited above. In *United States v. Carozo*, 37 F. Supp. 191 (D.C., 1941), a Federal district court dismissed an indictment against two labor organizations and associated individuals under the Sherman Act based on their efforts by means

<sup>14</sup> Compare this arrangement and the Commission's opinion with the statement below (R. 383) that petitioners' proposal would displace the I.C.C.

of strikes to force paying contractors in the Chicago area to abandon the use of concrete truck mixers or, if used, to employ the same number of men that would be employed if the truck mixers were not used. In so doing the court held that in order to support the indictment, it must appear that the activities of the labor organizations were not activities which come within the normal legitimate and lawful activities which may be employed by a labor union and which under both the Clayton Act and Norris-LaGuardia Act are exempt from prosecution under the Sherman Act. The court then went on to hold, in the following language, that the actions of the labor unions involved would constitute lawful activities for a labor organization:

“Such normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce their demands, as in the present case a demand against the use of labor saving devices which will displace their members; or, in the alternative, the demand that if the labor saving device is used, the same number of men be employed as would be if the other type of mixer were used. These are legitimate and lawful activities which a labor union is permitted to carry on in an effort to maintain employment and certain working conditions for its members, and any restraint of grade or commerce attendant thereon is only indirect and incidental.”

This decision was affirmed by the Supreme Court per curiam in *United States v. International Hodcarriers and Common Laborers' District Council of Chicago and Vicinity, et al.*, 313 U.S. 539 (1941). Likewise, in *United States v. American Federation of Musicians*, 47 F. Supp. 304 (1942) a Federal district court dis-

missed an injunction suit brought by the United States government to enjoin the musicians' union from carrying out a nation-wide boycott of recorded music which was supplanting the live music provided by members of the union. The dismissal was on the ground that the act sought to be enjoined was merely a refusal to work by employees in an effort to obtain, extend and preserve employment opportunities, and accordingly constituted legitimate activities of the union involved. The district court's action in dismissing the suit was affirmed by the Supreme Court, per curiam, in *United States v. American Federation of Musicians*, 318 U.S. 740 (1943). The per curiam opinion cited the decisions of the court in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) and *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91 (1940), both of which broadly interpret the term "labor dispute" found in the Norris-LaGuardia Act.

In addition, judicial decisions interpreting the scope of the phrase "terms and conditions of employment" with respect to the area of collective bargaining under the Labor-Management Relations Act of 1947 have given that phrase a broad interpretation consistent with the petitioners' proposal to the Railroad in this case. Thus, the Court of Appeals for the Fifth Circuit in *National Labor Relations Bd. v. Bemis Bro. Bag Co.*, 206 F. 2d 33 (1953) stated as follows with respect to the meaning of this phrase: (p. 36)

"The language of the statute, which requires bargaining with 'respect to wages, hours, and other terms and conditions of employment,' § 8(d), or in 'respect to rates of pay, wages, hours of employment, or other conditions of employment,' § 9(a), clearly contemplates matters and things which arise out of, and may properly be considered a part of, the employment relation,—the business in which

the employer and the employee participate as necessary and essential components in the furtherance of the enterprise. The Act contemplates the relationship in the work of the enterprise and the engagement of the employer and employee in its prosecution. Conditions under which this employment is, or should properly be, carried on, including those generally accepted as provisions proper to the discharge of the mutual obligations of the employer and employees, or even those which might be deemed fairly debatable which relate to the actual business operation, are within the provisions of the statute as 'conditions of employment'."

Certainly the continuance of employment or the conditions under which it is to be terminated, which were contemplated by the petitioners' proposal to the Railroad in this case, contemplate "matters and things which arise out of, and may properly be considered a part of, the employment relation,—the business in which the employer and the employee participate". Indeed, the court below has previously held that proposals no different in substance from that advanced by petitioner related to the "terms and conditions of employment" when they emanated from the employer's side. Thus, in *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374 (1954), the court below held that a proposal by an employer for a no-strike clause in a collective bargaining agreement involved a request upon which a union was required to bargain. The advantage of such a clause to the employer is, of course, that it provides stabilization of employment for his benefit. This Association does not perceive how a proposal for stabilization of employment is taken out of the realm of "terms and

conditions of employment" when it comes from the representatives of the employees and is for their benefit.

Thus, it is respectfully submitted that even if the duty to bargain under the Railway Labor Act is limited to matters concerning "rates of pay, rules, and working conditions" the petitioners' proposal to the Railroad involved such subject-matter and the Union could not be enjoined from striking to require the Railroad to confer with it on the proposal.

### III

**THE COURT OF APPEALS ERRED IN FINDING THAT THE DISPUTE BETWEEN THE UNION AND THE RAILROAD DID NOT INVOLVE A "LABOR DISPUTE" WITHIN THE MEANING OF THE NORRIS-LAGUARDIA ACT AND THAT SUCH ACT DID NOT BAR THE RAILROAD'S REQUEST FOR INJUNCTIVE RELIEF**

Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) reads in pertinent part as follows:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) ceasing or refusing to perform any work or to remain in any relation of employment;

\* \* \* \* \*

"(g) advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) agreeing with other persons to do, or not to do any of the acts heretofore specified; and

"(i) advising, urging or otherwise causing or inducing without fraud or violence the acts here-

tofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 8 of the Norris-LaGuardia Act reads as follows:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Section 13(a) of the Norris-LaGuardia Act (29 U.S.C. 113(a)) provides that a case shall be held to involve or grow out of a labor dispute within the meaning of Section 4 of that Act when, *inter alia*, the case involves persons engaged in the same industry, trade, craft, or occupation and is between an employer and one or more associations of employees. Section 13(c) of the Act (29 U.S.C. 113(c)) further defines the term "labor dispute" as follows:

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The controversy between the Union and the Railroad meets the requirements of Section 13(a) as it involves persons in one industry and is between a railroad employer in that industry and an employee organization

duly certified as the representative of a craft or class of employees of that railroad. However, the Court of Appeals found that the Norris-LaGuardia Act was inapplicable to this case because the proposal of the Union to the Railroad for an agreement concerning stabilization of employment is outside the ambit of "rates or pay, rules, or working conditions" as those words are used in the Railway Labor Act. (R. 385).

The court below erred, of course, in stating its conclusion in terms of the Railway Labor Act rather than the Norris-LaGuardia Act. The question before the court is not whether the dispute between the Union and the Railroad concerns "rates of pay, rules, and working conditions" as those words are used in the Railway Labor Act, but whether or not the controversy between the parties involved a "labor dispute" within the meaning of the Norris-LaGuardia Act. This distinction is of substantial significance in this case because of the fact that even if the Union's proposal did not concern "rates of pay, rules, and working conditions" as that phrase is used in the Railway Labor Act, it may still involve a "labor dispute" within the meaning of the Norris-LaGuardia anti-injunction statute. Under the decision of the Court of Appeals the latter statute is applicable to only one of the three classes of disputes recognized by Section 5, First of the Railway Labor Act. This involves a narrow construction of the anti-injunction statute whereas it is clear that the act must be given a broad and liberal interpretation in the light of its purposes. Indeed, this fact was long ago recognized by the Court of Appeals itself in one of its earlier decisions following the enactment of the Norris-LaGuardia Act. In *United Electric*

*Coal Companies v. Rice*, 80 F. 2d 1 (7th Cir., 1935)  
the Court stated as follows: (page 5)

"Looking to the purpose, as well as to the words, of the Act, we are satisfied that the term 'labor dispute' should be most broadly and liberally construed. The term 'labor disputes' comprehends disputes growing out of labor relations. It infers employment—implies the existence of the relation of employer and employee. Disputes between these parties are the general subject matter of this legislation. *All such disputes seem to be clearly included.*" (Emphasis supplied)

This Court has gone even further and in *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940) stated that the Norris-LaGuardia Act was intended to "drastically" curtail the jurisdiction of Federal courts in the field of labor disputes. The Court's statement on this point reads as follows: (page 101)

" \* \* \* § 1 of the Norris-LaGuardia Act, 29 USCA § 101, provides that 'No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act.' This unequivocal jurisdictional limitation is reiterated in other sections of the Act. The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes."

It is also clear that a "labor dispute" within the meaning of the Norris-LaGuardia Act is not limited to controversies over matters such as wages, hours, unionization or the betterment of working conditions. Thus, in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), this Court held that a controversy between a store and an organization of colored persons, who did not represent store employees, over efforts of the organization to induce the store by picketing to employ Negro clerks, involved a "labor dispute" within the meaning of the Norris-LaGuardia Act. In so holding the Court declared: (pp. 559, 560)

" \* \* \* The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions or employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. *We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous.*" (Emphasis supplied)

Likewise, the term "labor dispute" as used in the statute has been held to cover a strike for a closed shop, *Lauf v. Skinner*, 303 U.S. 323 (1938); the refusal of members of a union to work on buildings where a non-union contractor is employed, *Levering & Garrigues Co. v. Morrin*, 71 F. 2d 284 (C.A. 2, 1934); a controversy with respect to the performance of work by an employer himself, *Senn v. Tile Layers' Union*,

301 U.S. 468 (1937); and picketing to compel an employer to discharge a non-union employee, *Cinderella Theatre Co. v. Sign Writers' Union*, 6 F. Supp. 164 (D.C. Mich., 1934). In addition, it has been held that a strike to prevent the use of labor saving devices by an employer which will displace union members involves a labor dispute within the meaning of the Norris-LaGuardia Act, *United States v. Carrozo*, 37 F. Supp. 191 (D.C. Illinois, 1941), aff'd per curiam, *United States v. International Hod Carriers, et al.*, 313 U.S. 539 (1941), and that a nation-wide boycott by the American Federation of Musicians to prevent the use of canned music involves terms or conditions of employment within the intent of such Act. *United States v. American Federation of Musicians*, 47 F. Supp. 304 (D.C. Illinois, 1942), aff'd per curiam, *United States v. American Federation of Musicians*, 318 U.S. 740 (1943).

The controversy between the petitioner and the Railroad over its proposal for an agreement concerning stabilization of employment clearly involves a "labor dispute" within the interpretation of that term as set forth in the above-entitled cases. It is difficult to perceive how it can be concluded that the duration of employment or the existence of employment itself does not relate to "terms and conditions of employment" as that phrase is used in the Norris-LaGuardia Act. The statement of Judge Maris on this point in *Diamond Full Fashion Hosiery Co. v. Leader*, 20 F. Supp. 467 (D.C. E.D. Pa., 1937) has the force of logic and reason behind it, even though it is only a holding of a District Court not tested on appeal.<sup>14</sup> In that case an injunction

<sup>14</sup> The appeal was dismissed by agreement (99 F. 2d 1001).

was sought to enjoin a strike and picketing against the Vogue Company by its employees. The company had shut down its plant and that strike prevented the transfer therefrom of machinery which had been sold for use in another state. The court held that the controversy involved a "labor dispute" within the meaning of the Norris-LaGuardia Act in the following language: (p. 469)

"Does it involve a controversy concerning terms or conditions of employment? I think it does. *Certainly the duration of employment is one of its most vital terms.* Here the defendants had a union contract which was in force on August 6, and it was their contention that they had been locked out of their employment by the Vogue Company. I am satisfied from the evidence that their sole purpose in picketing the Vogue Mill was to endeavor to get their jobs back. All of the elements of a labor dispute were present. *Whether the defendants' position was justified or had any real basis is beside the point and is not for this court to pass upon. The fact remains that there was a dispute between the defendants and the Vogue Company and that it was a labor dispute.*" (Emphasis supplied)

The decision of the Sixth Circuit involving the Toledo, Ohio, yards of the New York Central cited by the court below (R. 385) is not dispositive of the application of the Norris-LaGuardia Act to the present case. In that situation the railroad brotherhoods involved had not asked the railroad to negotiate an agreement concerning the operation of the yards but were contending that the proposed action of the carrier in closing the yards violated existing contracts. This gave rise to a dispute over which the National Mediation Board refused to take jurisdiction under Section 5, First on the

ground that it was a matter referable to the National Railroad Adjustment Board. It, therefore, fell within the scope of the decision of this Court in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30 (1957) which was issued while the case was pending before the Court of Appeals.

The present case involves a controversy where the employee representative has presented a proposal to the Railroad for the making of an agreement. The only question is whether or not the refusal of the Railroad to confer and negotiate with the Union on this proposal gives rise to a "labor dispute" within the meaning of the Norris-LaGuardia Act. It is respectfully submitted that the decisions cited above interpreting the scope of that Act demonstrate that the controversy is within the ambit of the statute.

It is particularly inconsistent with the purposes of the Norris-LaGuardia Act to give the statute the narrow construction adopted by the Court of Appeals, since it was the use of strike injunctions in railroad labor disputes which give the greatest impetus to its enactment. See *United States v. United Mine Workers*, 330 U.S. 258 (1947).

#### IV

#### **THE DUTY OF A CARRIER TO CONFER AND SETTLE DISPUTES IMPOSED BY THE RAILWAY LABOR ACT CANNOT BE ABROGATED BY A PERMISSIVE AUTHORITY GRANTED BY A STATE REGULATORY COMMISSION**

The opinion of the Court of Appeals states that the proposal of the petitioner in this case is an effort to obtain through the collective bargaining processes of the Railway Labor Act that which would prohibit the Railroad from complying with orders of the South Dakota Public Utilities Commission and the Iowa

State Commerce Commission. (R. 382) The court also states that the demand of the petitioner would displace Congress, the Interstate Commerce Commission, and state regulatory commissions from the determination of the positions which must be maintained by the carrier from the standpoint of efficiency and economy. (R. 383)

The statement regarding Congress and the Interstate Commerce Commission obviously has no foundation in fact. There is not here involved any orders of the Interstate Commerce Commission which require the court to decide any question of accommodation between the Railway Labor Act and the Interstate Commerce Act. Nor is there involved any question of some other statutory directive of Congress. Indeed, the only displacing of Congress that is involved in this case is the holding of the court below limiting the plain and unambiguous direction of Congress that "all disputes" between carriers and employees be settled by voluntary negotiations at the conference table.

The holding of the Court of Appeals with respect to the effect of the petitioners' proposal upon orders of the South Dakota and Iowa state commissions relates to the permission granted by these commissions to the Railroad upon its petition to reduce its agencies and station agents. (R. 378-379) This holding in substance is to the effect that the state regulatory commissions in issuing these orders removed the subject-matter of the Union's proposal to the Railroad from the area of collective bargaining under the Railway Labor Act. It is submitted that this proposition is repugnant to the whole concept of the Railway Labor Act and the supremacy of the regulation of interstate commerce by Congress.

It is clear from the statements of the state commissions themselves that their orders were not intended to interfere with collective bargaining between the Union and the Railroad under the Railway Labor Act and that there is no conflict between those orders and the agreement which the Union proposed to the Railroad. (R. 215, 335)

Moreover, if there were a conflict the provisions of the Railway Labor Act would take precedence over the orders of the state commissions. As has been previously observed, the purpose of Congress in enacting the Railway Labor Act was to promote peace in the field of rail transportation for the settlement of all disputes between carriers and employees. To this end, Congress has provided a system of collective bargaining, mediation, arbitration and fact finding.

If this duty imposed by Congress can be abrogated by an order of a state regulatory commission, the entire structure and concept of the Railway Labor Act has been undermined. It is clear, we believe, that Congress did not intend any such result, nor can there be any serious question of its power to pre-empt this field of regulation, even to the extent of overriding state constitutional provisions.

In *Railway Employees' Dept., A.F.L. v. Hanson*, 351 U.S. 225 (1956), this Court in upholding the authority of Congress to override state laws and state constitutional provisions conflicting with federal regulation of labor-management relations on the railroads stated as follows: (p. 233)

"But the power of Congress to regulate labor relations in interstate industries is likewise well-established. Congress has authority to adopt all appro-

priate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.' *Texas & N. O. R. Co. v. Brotherhood of R. & S.S. Clerks*, 281 US 548, 570, 74 L ed 1034, 1046, 50 S Ct 427. These measures include provisions that will encourage the settlement of disputes 'by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them.' (*Virginian R. Co. v. System Federation, R. E. D.* 300 US 515, 548, 81 L ed 789, 800, 57 S Ct 592), and that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. *NLRB v. Jones & L. Steel Corp.* 301 US 1, 33, 81 L ed 893, 909, 57 S Ct 615, 108 ALR 1352. *Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained.*" (Emphasis supplied)

In the field of railroad labor relations, Congress has chosen the method of collective bargaining and mediation as the best means of preventing interruptions to interstate commerce and has imposed a duty upon carriers and employees to bargain out their disputes. No state can relieve a carrier from this federally imposed duty or restrict the area of bargaining under the federal statute. Any question with respect to this conclusion is removed by the decision of this Court in *California v. Taylor*, 353 U.S. 533 (1957) wherein it was held that the provisions for collective bargaining under the Railway Labor Act overrode provisions of state laws prohibiting such bargaining on a state-owned railroad. In so holding, this Court spoke as follows: (pp. 559-560)

"If the Railway Labor Act applies to the Belt Railroad, then the carrier's employees can invoke its machinery established for adjustment of labor controversies, and the National Railway Adjustment Board has jurisdiction over respondents' claims. Moreover, the Act's policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively with the State concerning terms and conditions of employment which are fixed by the State's civil service laws. This state civil service relationship is the antithesis of that established by collectively bargained contracts throughout the railroad industry. 'Effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.' Order of R. Telegraphers v. Railway Exp. Agency, Inc. *supra* (321 US at 347). If the Federal Act applies to the Belt Railroad, then the policy of the State must give way."

The Court then concluded that the Railway Labor Act did apply to the state-owned railroad and that it was supreme in regulating labor relations on that railroad. To the same effect is the decision in *New Orleans Public Belt Railroad Commission v. Ward*, 195 F. 2d 829 (5th Cir. 1952).

The court below, therefore, clearly erred in holding that the duty of the carrier to bargain under the Railway Labor Act must give way to the permissive regulatory orders of a state commission.

**CONCLUSION**

Upon the basis of the foregoing points and authorities, it is respectfully submitted that the judgment of the Court of Appeals granting a permanent injunction should be reversed.

Respectfully submitted,

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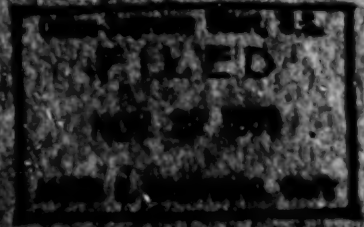
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November, 1959

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No. 106

In the Supreme Court of the United States

WILLIAM J. BENTLEY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Petition for a writ of Habeas Corpus.

Submitted on the merits of the writ.

For the Appellant, \_\_\_\_\_

For the Appellee, \_\_\_\_\_

**In the Supreme Court of the United States**

OCTOBER TERM, 1959

---

No. 100

THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,  
PETITIONERS

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

---

MEMORANDUM FOR THE NATIONAL MEDIATION BOARD AS  
AMICUS CURIAE

---

The Solicitor General is filing this memorandum, on behalf of the National Mediation Board, to set forth the Government's views on the following question presented by the petition for certiorari (p. 13):

Whether the Court of Appeals erred in not reversing the District Court's holding that the Railway Labor Act withdraws the right to strike for a second thirty day period following the failure of emergency mediation services.

Although the court of appeals did not find it necessary to pass upon the ruling referred to in the

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

**No. 100**

**THE ORDER OF RAILROAD TELEGRAPHERS,**

**A VOLUNTARY ASSOCIATION, ET AL.,**

*Petitioners,*

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, A CORPORATION,**

*Respondent.*

**PETITIONERS' BRIEF ON THE MERITS.**

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mediation gave rise to a second 30-day waiting period; that it would therefore enjoin the strike until expiration of such 30-day period on September 19, 1958; and that the court otherwise was without jurisdiction to enjoin the strike (R. 167-170). The decree which was entered enjoined the Telegraphers from striking until midnight September 19, 1958 (R. 359); but, following the carrier's appeal from this judgment, the district court, upon the basis of Rule 62(c) of the Federal Rules of Civil Procedure, enjoined the Telegraphers from striking prior to decision of the carrier's appeal (R. 371).

Section 5, First, of the Railway Labor Act, 45 U.S.C. 155, First, provides that either party to a dispute between a group of employees and a carrier<sup>3</sup> may invoke the services of the National Mediation Board (a) in case of a dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference, or (b) in case of any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties. The section also provides that the Board "may proffer its services in case any labor emergency is found by it to exist at any time".

The section (set forth in full in the Appendix, *infra*, pp. 11-12) specifies the procedural steps which are req-

---

<sup>3</sup> As used in the Act, the word "carrier" means railroads, express companies and sleeping-car companies subject to the Interstate Commerce Act (45 U.S.C. 151), but the Act of April 10, 1936, extended the provisions of the Railway Labor Act, except Section 3, to common carriers by air engaged in interstate or foreign commerce (45 U.S.C. 181).

uisite following invocation or proffer of the Board's services. The Board shall promptly put itself in communication with the parties to the controversy and shall use its best efforts, by mediation, to bring them to agreement. If it fails to bring about a settlement, it shall at once endeavor "as its final required action" to persuade the parties to submit their controversy to arbitration. If one or both parties refuse arbitration, the Board shall immediately notify both parties in writing that its mediatory efforts have failed, and for 30 days thereafter working conditions and practices are to remain as they were at the time the dispute arose.

In controversies of the type which come before the Board under Section 5, First, successful termination through mediation or arbitration requires some willingness by the parties involved to adjust or compromise the points in dispute. Realization that failure to achieve settlement will lead, or is likely to lead, to strike action at the end of a 30-day stand-still period puts upon both parties pressure to avoid the consequences of this kind of economic warfare, seriously injurious to each of them.

Such pressure would be materially dissipated if the statute means that after the procedures specified by Section 5, First, have been pursued to the end without avail, a subsequent proffer by the Board of its mediation services on the eve of a strike requires a repetition of these procedures and a second 30-day waiting period following notification of termination of the Board's emergency mediatory efforts. The parties would be aware that failure to effect settle-

ment would not necessarily bring matters to a head 30 days thereafter. There would be the expectation that a strike called following termination of the required 30-day stand-still period would lead to a proffer of emergency mediation, and a repetition of the section's procedures and a second 30-day stand-still period.

Emergency mediation itself would, in the Board's view, lose much of its efficacy if failure therein meant that there would be an ensuing 30-day waiting period, with the possibility that at the end of this period there would be another proffer of emergency mediation giving rise, on failure, to a third 30-day waiting period. We cite below seven relatively recent successful emergency mediations after lack of success in mediation undertaken on the application of one or both of the parties.\* The Board regards its success in such emergency mediation as largely due to the pressures operating on both parties where the consequences of failure are both serious and im-

---

\*1. E-89, Pan American World Airways, Inc. and Air Line Pilots Association.

2. E-124, Braniff Airways, Inc. and Air Line Pilots Association.

3. E-126, Chicago, North Shore & Milwaukee Railway and various nonoperating railway labor organizations.

4. E-130, Braniff Airways, Inc. and International Association of Machinists.

5. E-138, New York Central System and American Railways Supervisors Assn.

6. E-149, Western Air Lines, Inc. and Air Line Pilots Association.

7. E-158, Southern Pacific Company (Pacific Lines) and Order of Railway Conductors and Brakemen.

mediate. This would not be the situation if failure of emergency mediation resulted in the starting of another 30-day waiting period.

In each of the seven successful emergency mediations previously referred to, the Board's action manifested that it construed the statute as providing for only one go-around of Section 5, First, procedures, including its 30-day waiting period. In each of these cases the Board requested the labor union involved to postpone its strike date pending mediation. If the fact of emergency mediation, after prior failure of mediation on application of the parties, brought about a stand-still until the emergency mediation had failed and for 30 days thereafter, it was neither necessary nor appropriate for the Board to request postponement of the strike date. Furthermore, in substantially all of these instances the union acceded to the Board's request on the understanding that, if the emergency mediation failed, the employees would be free to strike immediately upon such failure.

The Board's construction of the statute in the instances cited exemplifies what has been the Board's long-continued and consistent interpretation. Of course, great weight is given the interpretation placed upon a statute by the administrative agency charged with its enforcement. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315; *United States v. Amer. Trucking Ass'ns.*, 310 U.S. 534, 549.

In *Toledo, P. & W. R.R. v. Brotherhood of Railroad Trainmen*, 132 F. 2d 265 (C.A. 7), one of the issues was whether the district court had violated

Section 8 of the Norris-LaGuardia Act, 29 U.S.C. 108, by granting an injunction against a strike by railroad employees. Section 8 bars grant of injunctive relief to any complainant "who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question". The court considered only whether the plaintiff railroad's refusal to arbitrate the dispute was a failure to comply with an "obligation imposed by" the Railway Labor Act. 132 F. 2d at 271. But if that Act means that upon failure of emergency intervention by the National Mediation Board, following failure of its mediatory efforts undertaken at the invocation of one or both parties, there must be a second stand-still period, the railroad unmistakably failed to comply with an obligation—observance of the second stand-still period—imposed by the Railway Labor Act.<sup>5</sup> Thus the court,

---

<sup>5</sup> The Board's services were invoked on January 15, 1941, in a dispute occasioned by the railroad's announcement of a schedule of new rules, working conditions and rates of pay. On November 21, 1941, the Board notified the parties that mediation had been unsuccessful and arbitration had been refused. On December 21, 1941, immediately following the required 30-day stand-still period, the railroad gave notice that it would put its schedule into effect on December 29. But prior to this notice the Board had proffered its services in the "national emergency" created by the bombing of Pearl Harbor on December 7, which emergency intervention failed some time prior to December 29. Accordingly, the railroad undertook to change its rates of pay, rules and working conditions short of 30 days after the failure of emergency intervention.

For the facts here stated, see 132 F. 2d at 272; and 321 U.S. at 52.

by affirming the district court's injunction, implicitly held that the emergency intervention did not give rise to a second stand-still period.

In *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co.*, 321 U.S. 50, this Court reversed the decision of the court of appeals, but it did so, not upon the ground of the railroad's failure to observe the required 30-day stand-still period, but on the basis of the further provision of Section 8 of the Norris-Laguardia Act, which declares that no injunctive relief shall be granted to a complainant who has failed to make "every reasonable effort" to settle the dispute by negotiation or with the aid of governmental machinery or voluntary arbitration. If the railroad's noncompliance with the 30-day waiting period of Section 5, First, of the Railway Labor Act had been a bar to injunctive relief, this Court would have had no occasion to reach the question upon which it rested its decision.

We submit that the statutory scheme gives no indication that Congress intended that the procedural provisions and prescriptions of Section 5, First, should apply a second time, upon emergency mediation by the Board, after the Board has previously pursued all these procedures in mediation upon application of a party to the dispute. We believe that to give the statute this construction would limit its effectiveness and would therefore be contrary to the purposes declared in Section 2 of the Act, 45 U.S.C. 151a. We

urge finally that this construction should be rejected because it is inconsistent with the settled administrative interpretation and with the construction of the statute implicit in the decisions rendered in the *Toledo* case.

Respectfully submitted.

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ROBERT A. BICKS,  
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NOVEMBER 1959.

## APPENDIX

Section 5, First, of the Railway Labor Act, 45 U.S.C. 155, First, provides:

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and

for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

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~~IN~~ THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

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**No. 100.**

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**THE ORDER OF RAILROAD TELEGRAPHERS,**  
A VOLUNTARY ASSOCIATION, ET AL.,  
*Petitioners,*

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, A CORPORATION,**  
*Respondent.*

---

**PETITIONERS' BRIEF ON THE MERITS.**

---

*To the Honorable, the Chief Justice of the United States  
and the Justices of the Supreme Court of the United  
States:*

The petitioners, The Order of Railroad Telegraphers,  
*et al.* (hereinafter "the Union"), respectfully show:

**JURISDICTION.**

The jurisdiction of this Court is based on 28 U. S. C.  
§ 1254(1). The judgment of the Court of Appeals for the  
Seventh Circuit was entered on March 13, 1959. Certiorari  
was granted by this Court on October 12, 1959.

### OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, per Perry, J., is not reported. It may be found in the Record at pp. 165-71. The findings of fact and conclusions of law of the District Court appear in the Record at pp. 351-358. The opinion of the Court of Appeals is reported at 264 F. 2d 254. It also is reproduced in the Record at pp. 377-385.

### STATUTES AND RULES INVOLVED.

**Norris-LaGuardia Act, §§ 1, 4, 7, 8 and 13(c); 29 U. S. C. §§ 101, 104, 107, 108 and 113(c):**

#### Section 1. Norris-LaGuardia Act.

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U. S. C. § 101.

#### Section 4. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization,

regardless of any such undertaking or promise as is described in section 103 of this title;

“(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value.

“(d) By all lawful means aiding any person participating or interested in any labor dispute, who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

“(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

“(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

“(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

“(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

“(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.” 29 U. S. C. § 104.

#### Section 7. Norris-LaGuardia Act.

“No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

“(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but

no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

“(b) That substantial and irreparable injury to complainant's property will follow;

“(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

“(d) That complainant has no adequate remedy at law; and

“(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

“Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvi-

dent or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity." 29 U. S. C. § 107.

#### Section 8. Norris-LaGuardia Act.

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

#### Section 13(c). Norris-LaGuardia Act.

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113(c).

**Railway Labor Act, §§ 2, First, 2, Second, 5, First, 6 and 10; 45 U. S. C. §§ 152, First, Second, 155, First, 156 and 160:**

**Section 2, First. Railway Labor Act.**

"First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. § 152, First.

**Section 2, Second. Railway Labor Act.**

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U. S. C. § 152, Second.

**Section 5, First. Railway Labor Act.**

"First. The parties, or either party, to a dispute between an employee or group of employees, and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." 45 U. S. C. § 155, First.

#### Section 6. Railway Labor Act.

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termina-

tion of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

#### Section 10. Railway Labor Act.

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation."

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman."

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." 45 U. S. C. § 160.

**Federal Rules of Civil Procedure, Rule 62(c).**

"Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

**Federal Rules of Civil Procedure, Rule 65(e).**

"Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. §-2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. Par 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

**Federal Rules of Civil Procedure, Rule 82.**

"Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

### STATEMENT.

This case presents the question whether the laws of the United States, implemented by the injunctive powers of the federal courts, preclude railway labor unions from securing voice through collective bargaining in the determination of how the fruits of increased productivity and the consequent burdens of technological unemployment are to be distributed between employers and employees. It arose out of the following facts.

On December 23, 1957, the Union, the certified collective bargaining agent pursuant to the Railway Labor Act for the station, telegraph, and tower employees of the Railroad (Finding 2, R. 351), served a notice pursuant to § 6 of the Railway Labor Act, 45 U. C. S. § 156, to amend the agreement between them by adding the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." (Finding 3, R. 352.)

The reason for the proposal was stated by the Union's President as follows:

"... there has been a change in the management of the Chicago and North Western System. There had been a general slaughter of positions. I mean of jobs. There had also been a consolidation between Omaha and the North Western. Our organization had lost a number of jobs already.

"The incidents or occurrences that I have described extend to and affect all classes of employees represented by the Order of Railroad Telegraphers. Based on our membership survey, approximately one hundred positions had been eliminated other than in the station agent positions." (R. 120.)

The Railroad refused to confer on the subject of the § 6 notice. (Finding 4, R. 352.) The Railroad's intransigent

position on this was revealed in the testimony at the trial by Mr. Heineman, Chairman of the Railroad:

"You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified nor in my opinion can it be." (R. 104.)

After the Railroad's refusal to discuss the proposed rule, the Union notified the Railroad that it was processing the § 6 notice pursuant to the terms of the Railway Labor Act. (Finding 5, R. 352-53.) On February 5, 1958, the Union made application for the mediation services of the National Mediation Board. (Finding 6, R. 353.) The Board docketed the case as Case No. A-5696. (Finding 7, R. 353.) But the mediator assigned by the Board was unable to persuade the Railroad to discuss the merits of the proposed rule and, on May 27, 1958, informed the parties that he had been unsuccessful in his efforts and suggested arbitration in accordance with the provisions of the Railway Labor Act. Both parties declined arbitration. (Finding 8, R. 353.) Mediation was terminated on June 16, 1958, and the file was closed on July 16, 1958. (R. 50-51, 333.)

Under date of July 10, 1958, the Union sought the views of its membership on the question whether a strike should be authorized if necessary to seek a satisfactory settlement of the dispute arising from the proposal of the Union. (Finding 10, R. 354.) The vote in favor of the strike was almost unanimous. (*Ibid.*) No strike action was taken by the Union until after the thirty-day period following the termination of mediation had expired. On August 18, 1958,

a strike call was issued to commence August 21, 1958. (Finding 11, R. 354.) On the day the strike call was issued, the Mediation Board proffered its services on an emergency basis. (Finding 12, R. 354-55.) Both sides accepted the proffer. (*Ibid.*) Case No. E-175, as it was docketed, proved equally futile and was closed by the Board on August 20th, 1958. (*Ibid.*) The Mediation Board did not notify the President that "in its judgment" the impending strike threatened "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service" so as to invoke the President's discretion to appoint an emergency board under Section 10 of the Railway Labor Act. (45 U. S. C. § 160.)

After the service of the § 6 notice, the Railroad pressed proceedings before the Iowa and South Dakota regulatory commissions for permission to adopt its Central Agency Plan which called for the abolition of numerous station agent positions then held by members of the Union. Both commissions granted permission to institute the Railroad's plan for job abolition.

On August 20th, the Railroad instituted this action in the United States District Court for the Northern District of Illinois, asserting that it was entitled to an injunction against the proposed strike because the strike was illegal under the laws of the United States. (R. 4.) Since no diversity of citizenship exists between the parties, the Railroad's right to relief, if it has any, must depend on the notion that the laws of the United States give a right to injunction under the circumstances of this case.

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\* The order of the South Dakota Commission, when first issued, purported to be mandatory in character. On denial of application for rehearing the Commission disclaimed any intention to interfere with the Railroad's obligations under the Railway Labor Act or its labor agreements. (R. 341-42.) See also pp. 56, 57 *infra*.

On the day that the complaint was filed, the District Court issued a preliminary restraining order enjoining defendants from striking until August 25, 1958. (R. 14-15.) From time to time this order was extended. (R. 15, 73-74, 74.) A bond for \$50,000 posted by North Western was kept in effect during the period of the restraining orders and is still in effect. (R. 1, 73.) The District Court heard the evidence and arguments on the questions of a temporary and permanent injunction on August 25-27, 1958. (R. 1.) After the filing of briefs and further argument, the court rendered its opinion on September 5 and entered its findings of fact and conclusions of law and its decree on September 8, 1958. (R. 165-71; 351-58; 359.) The decree enjoined the strike until September 19, 1958, on the ground that this was the expiration of thirty days following the second Mediation Board effort. (Conclusion 5, R. 358.) In all other respects, it denied the relief sought by the Railroad and dismissed the complaint. On September 16, 1958, however, the District Court, on application of the Railroad, entered an order enjoining petitioners from striking until the disposition of the Railroad's appeal. (R. 371.) A bond for \$50,000 was posted by the Railroad and is still in effect. (R. 2, 371.) Both the Railroad and the Union appealed from the decree of the District Court. (R. 366, 360, 363, 372-73.)

Pending appeal in the Court of Appeals, the petitioners filed a petition for mandamus and a petition for certiorari before judgment in this Court, on the grounds, *inter alia*, that the Norris-LaGuardia Act prevented the issuance of the injunction pending appeal and that the Railway Labor Act does not require a thirty-day postponement of a strike after emergency mediation when all required action had previously been completed. Both petitions were denied. 358 U. S. 916, 920 (1958).

On March 13, 1959, the Court of Appeals for the Seventh Circuit decided the appeals before it in this case. It held that the issue raised by the 56 notice was not one relating to rates of pay, rules, and working conditions, thereby upsetting the trial court's finding as "clearly erroneous." 264 F. 2d at 260. From this false premise it reached a false conclusion, a conclusion which would be in error even if the premise had been valid: that because the issue "is not within the scope of mandatory bargaining . . . the terms of the Norris-LaGuardia Act are here inapplicable." (*Ibid.*) It was to review the judgment based on this opinion that the petition for certiorari was granted.

### QUESTIONS PRESENTED.

1. Whether the "laws of the United States", and more specifically the Railway Labor Act and the Interstate Commerce Act, make it illegal for a railway labor union to secure a voice through collective bargaining in the determination of how the fruits of increased productivity and the burdens of consequent technological unemployment are to be distributed between employers and employees, and warrant the interposition of the injunctive processes of the federal courts against a strike for such purposes.

2. Whether the Court of Appeals erred in holding that the contest between the Union and the Railroad, over the Union's proposal to participate in the decision of what jobs which its members hold may be abolished, was not a "labor dispute" within the meaning of the Norris-LaGuardia Act.

3. Whether the Court of Appeals erred in holding that the contract change proposed by the Union did not present a bargainable issue under the Railway Labor Act.

4. Whether the Court of Appeals erred in holding that the Norris-LaGuardia Act does not prohibit the issuance of a strike injunction where the employer has refused to comply with the terms of the Railway Labor Act.

5. Whether the Court of Appeals erred in holding that the right of the Union to propose changes in a contract, bargainable under the Railway Labor Act, was limited by action of State regulatory commissions.

6. Whether the District Court had jurisdiction to entertain this suit in the absence of diversity of citizenship and in the absence of any question "Arising under the Constitution or laws of the United States."

7. Whether the Court of Appeals erred in not reversing the District Court's holding that Rule 62(f) of the Federal Rules of Civil Procedure authorizes a federal court to issue an injunction against a strike despite the Norris-LaGuardia Act's prohibition against such an injunction.

8. Whether the Court of Appeals erred in not reversing the District Court's holding that the Railway Labor Act withdraws the right to strike for a second thirty day period following the failure of emergency mediation services.

## SUMMARY OF THE ARGUMENT.

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This is a case "involving or growing out of a labor dispute" within the meaning of the Norris-LaGuardia Act; accordingly, no court of the United States has or had jurisdiction to issue any restraining order or temporary or permanent injunction.

The Norris-LaGuardia Act establishes a fundamental national policy against interference by injunction with the free play of economic forces in the settlement of labor disputes.

This Court has never held the Norris-LaGuardia Act inapplicable in a railway labor dispute on the ground that the dispute was not one involving or growing out of a labor dispute within the meaning of the Act. Widespread industry practice establishes that job security is a common subject of bargaining, so that a dispute arising from a proposal to bargain concerning such a subject is clearly one involving or arising out of a labor dispute.

The agreement proposed by the Union is one with respect to which the Railway Labor Act imposes the duty to bargain, from which it follows that, even accepting the reasoning of the Court of Appeals, the case is one involving or growing out of a labor dispute. To whittle away the broad and unequivocal imperative of that Act by making exceptions to the duty of collective bargaining will lead to a breakdown of the national policy for settlement of railway labor disputes by injecting into all negotiations an issue as to bargainability.

Even if it be assumed that the subject of the proposed agreement is not one with respect to which the Railway Labor Act imposes a duty to bargain, the case is still one

involving or growing out of a labor dispute and the Norris-LaGuardia Act forbids the issuance of injunction.

Since the Railroad failed and refused to comply with the obligation, imposed by the Railway Labor Act, to bargain concerning the proposed contract change, injunctive relief in any event is barred by Section 8 of the Norris-LaGuardia Act.

Even if it be assumed arguendo that the subject of the proposed agreement was not one with respect to which bargaining was mandatory under the Railway Labor Act, Section 7 of the Norris-LaGuardia Act forbids the issuance of injunction since the findings required by that section have not been and cannot be made.

Irrespective of the Norris-LaGuardia Act, this case is not within the judicial power of the federal courts under Section 1331 or Section 1332 of the Judicial Code, or otherwise. Diversity jurisdiction does not exist and the claim asserted by the Railroad is not one arising under the laws of the United States.

The order of the regulatory commissions of South Dakota and Iowa cannot alter the obligations of the Railroad with respect to collective bargaining under the Railway Labor Act. The States are not empowered to detract from the national scheme for resolution of disputes between management and labor by declaring unlawful the end to which contract negotiations are directed.

Rule 62(c) of the Federal Rules of Civil Procedure did not authorize the District Court to issue an injunction pending appeal. Rules 65(e) and 82 and the history of the Rules make it very clear that no modification of the Norris-LaGuardia Act was either possible or contemplated. To give such an interpretation to Rule 62(c) would be to eviscerate Congressional policy by means of a judicial rule of procedure.

The injunction order restraining the proposed strike for a second period of thirty days following termination of the emergency mediation services of the National Mediation Board is based on an interpretation of the Railway Labor Act without support in the language of that Act, without precedent, and counter to the custom and tradition in the handling of disputes in the railroad industry and the practical interpretation placed upon the Act by the National Mediation Board. It would frustrate one of the principal purposes of the Act, the settlement of disputes on an emergency basis.

Consequently, all injunctive orders issued in the case should be vacated and the action dismissed.

## ARGUMENT.

### I.

**THIS IS A CASE "INVOLVING OR GROWING OUT OF A LABOR DISPUTE" WITHIN THE MEANING OF SECTION 1 OF THE NORRIS-LA GUARDIA ACT.**

**1. The Policy Against the Issuance of Injunctions in Labor Disputes.**

This case presents a revival of the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed. See generally, Cox, *Cases on Labor Law*, pp. 8-123 (4th Edition, 1958); Gregory, *Labor and the Law*, Chapters I-VII (1946). It is hardly necessary to remind this Court of the importance of the national policy expressed in the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.* As early as 1914 Congress sought through the Clayton Act (29 U. S. C. §§ 52 *et seq.*) to curb those abuses, which nevertheless continued. "In large part, dissatisfaction and resentment are caused . . . By the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction,' characterized by the consequences of a criminal proceeding without its safeguards, has been challenged." Frankfurter & Greene, *The Labor Injunction* 200 (1930). In the words of the late Mr. Justice Brandeis, the labor injunction was not

ordinarily sought "to prevent property from being injured; nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men." *Truax v. Corrigan*, 257 U. S. 312, 354, 368 (1921) (dissenting opinion). In 1932 Congress, in the Norris-LaGuardia Act, reaffirmed its policy against such abuse of the judicial process, this time with an effectiveness which has endured for a generation. Now, however, the Court of Appeals for the Seventh Circuit, reading the Act with a narrow and hostile interpretation reminiscent of the decisions which emasculated the Clayton Act, has declared that the federal courts must in a large and growing area of industrial conflict resume the role from which they were withdrawn by Congress, and must once again "take up the shock of our industrial warfare." Pepper, *Injunctions in Labor Disputes*, 49 A. B. A. Rep. 174, 179 (1924).

## 2. This Case Is One Involving or Growing Out of a Labor Dispute as Defined in the Norris-LaGuardia Act.

The Norris-LaGuardia Act provides: "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . ." (29 U. S. C. § 101), with exceptions not material here (*id.*, § 107). The definition of the term "labor dispute" is comprehensively broad: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment . . ." (*id.*, § 113 (c)). The Union, pursuant to the Railway Labor Act, gave notice of a proposal to change the terms of an existing collective bargaining agreement. The proposed change required collective bargaining with respect to the abolition or discontinuance of existing posi-

tions. The dispute arose when the Railroad refused to bargain concerning the proposed change. It is evident that the proposed change in the agreement related to: (1) the length or duration of employment, and (2) the security of job tenure.

This Court has *never* failed to apply the Norris-LaGuardia Act in a railway labor situation on the ground that the case did not involve or grow out of a labor dispute within the meaning of that Act.

This Court has held that the Norris-LaGuardia Act does not preclude injunction in three situations involving railway labor:

(1) Where the dispute is a "minor" one under the Railway Labor Act—i.e., a dispute concerning the application or interpretation of a collective bargaining agreement and which "contemplates the existence of a collective agreement already concluded, or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 723 (1945). For such disputes the Act provides compulsory arbitration on the initiative of either party, and the Norris-LaGuardia Act has been held inapplicable to disputes pending before the Railroad Adjustment Board. *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

The dispute from which *Chicago River* arose was a minor dispute—"twenty-one grievances of members of the Brotherhood against the carrier. Nineteen of these were claims for additional compensation, one was a claim for reinstatement to a higher position, and one was for reinstatement in the employ of the carrier." 353 U. S. at 32. Minor disputes "are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." 353 U. S.

at 33. For such disputes this Court held the Railway Labor Act provided a procedure for compulsory arbitration. The dispute had been submitted in accordance with the Act to the Adjustment Board and was pending at the time of the strike notice and the suit for injunction. The carrier had complied with the Act, and exhausted its remedies thereunder. 353 U. S. at 41, n. 22. The injunction was issued "to vindicate the processes of the Railway Labor Act" 353 U. S. at 41. The specific reason for holding that the Railway Labor Act modified the Norris-LaGuardia Act with respect to minor disputes was that the former provided for compulsory arbitration, so that "Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." 353 U. S. at 41.

The present case involves a major dispute, not a minor one. The Union has exhausted the procedures of the Railway Labor Act. For such disputes that Act provides no alternative to "the natural interplay of the competing economic forces of labor and capital." 353 U. S. at 40. It was the purpose of Congress to prevent federal injunctions from interfering with that interplay (*ibid.*), and the Railway Labor Act does not, in such a case as this, qualify that purpose.

(2) Where the activity enjoined is in itself illegal, *e.g.*, where the union and the employer have agreed to discriminate against certain employees solely on racial grounds. *Trainmen v. Howard*, 343 U. S. 768 (1952).

(3) Where injunctive relief is necessary to compel compliance with positive mandates of the Railway Labor Act. *Virginian R. Co. v. System Federation*, 300 U. S. 515 (1937).

The Court of Appeals did not rely on the principle that a strike may be enjoined if it arises out of a minor dispute with respect to which the Act provides for compulsory

arbitration. It could hardly have done so, since this case clearly involves a major rather than a minor dispute: i.e., a dispute relating to the negotiation of contract terms, not to their interpretation or application. Instead it cited and relied upon the racial discrimination cases, which clearly do not support its decision, and upon a decision by the Court of Appeals for the Sixth Circuit (*Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114 (C.A. 6, 1957), cert. denied, 355 U. S. 877) which is clearly distinguishable from the case at bar.

In the *Howard* case, *supra*, the carrier and the union had entered into an agreement which had the effect of causing the railroad to discharge Negro "train porters" who had been performing the duties of brakemen. At the suit of one of the Negro "train porters" against whom this agreement was directed, this Court held that Norris-LaGuardia did not deprive the courts of power to enjoin the execution of the agreement. This Court said: " \* \* \* discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." 343 U. S. at 773. In unqualified terms the Court stamped the agreement as "unlawful" (343 U. S. at 774)—a term which by no stretch of the imagination can be applied to the agreement proposed by the Union in this case..

Since the agreement proposed by the Union's Section 6 notice would have been a perfectly lawful one, the Court of Appeals' decision that the Norris-LaGuardia Act does not apply can be supported only by the notion that what is here involved is not a labor dispute within the meaning of that Act. But the very line of cases on which the Court of Appeals relied establishes with complete clarity that Norris-LaGuardia was held inapplicable therein *not* because there was no labor dispute but because the activity enjoined

was outlawed by federal law and policy. In *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949), another of the racial discrimination cases cited and relied on by the Court of Appeals, this Court said:

"In *Virginian R. Co. v. System Federation*, 300 U. S. 515, we held that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act \* \* \* enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-LaGuardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.' \* \* \*

"But the Brotherhood urges that the controversy in the *Virginian* case did not involve a labor dispute within the meaning of the Norris-LaGuardia Act and that accordingly that case must be distinguished on its facts. The Act defines a 'labor dispute' to include 'any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. \* \* \*' 29 U. S. C. § 113 (c). \* \* \* We do not accept the Brotherhood's invitation to narrow the meaning of that term. The purpose of the Act would be vitiated and the scope of its protection limited were it to be construed as not extending to efforts of a duly certified bargaining agent to obtain recognition by an employer. Moreover, if this Court had considered that a labor dispute was not involved, it would hardly have taken the trouble, in the *Virginian* case, to refute contentions based upon parts of the Act,

which as a whole extends its protection solely to such disputes." 338 U. S. at 237-38. (Emphasis in the original.)

In sum, this Court has *never* held the Norris-LaGuardia Act inapplicable in a railway labor situation on the ground that the case was not one involving or growing out of a labor dispute within the meaning of that Act. It has only held that injunctions are available: (1) to require adherence to the Railway Labor Act's procedure for compulsory arbitration of minor labor disputes; (2) to prevent the execution of agreements which discriminate solely on grounds of race and are therefore inconsistent with the policy of the Railway Labor Act and unlawful; and (3) to vindicate rights positively conferred by the Railway Labor Act.

The other case relied on by the Court of Appeals is the decision of the Sixth Circuit in *Brotherhood of Railroad Trainmen v. New York Cent. R. Co.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied 355 U. S. 877. There the strike was regarded by the court as a mere protest by the union against a managerial decision to close a certain yard, there being no relevant provision in the collective-bargaining agreement. There was no proposal for a new contract, or contract term. There was no Section 6 notice. There was no history, as here, of a consistent refusal by the railroad to bargain over a properly filed Section 6 notice. There was no existing controversy with regard to re-allocation of jobs. Here approximately one hundred positions in addition to station agent positions had been abolished and many more were threatened. In the *New York Central* case the National Mediation Board found that it had no jurisdiction; here the Board took jurisdiction and exhausted the mediation provisions of the Act, even intervening a second time on its own motion.

If the subject of the proposed agreement is one with

respect to which the Railway Labor Act imposes a duty to bargain, as we show in Part I, 3 *infra*, it is certainly true that a dispute arising out of the respondent's refusal to bargain is a labor dispute within the meaning of the Norris-LaGuardia Act. The converse does not follow, and is not true. Even if it were thought that the matter is not within the scope of the duty to bargain imposed by the Railway Labor Act the Norris-LaGuardia Act would still be applicable. See Part I, 4, *infra*.

**3. The Agreement Proposed by the Union Is One With Respect to Which the Railway Labor Act Imposes the Duty to Bargain, and It Follows That, Even Under the Reasoning of the Court of Appeals, This Case Involves or Grows Out of a Labor Dispute.**

*A. The Railway Labor Act places no limit on the scope of collective bargaining but on the contrary requires bargaining on all subjects.*

The cases arising under the Railway Labor Act establish that issues relating to stabilization of employment and the impact of technological progress are bargainable issues, well within the scope of the statutory duty to bargain.

Collective bargaining, for example, with reference to the size of a crew, or whether work may be taken from a particular group of employees, is well recognized. The most recent court case concerned with this problem is *Butte, Anaconda and P. R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 268 F. 2d 54 (C. A. 9, 1959), cert. denied October 19, 1959, \_\_\_\_\_ U. S. \_\_\_\_\_ (1959). In that case, the court held that a dispute arising from section 6 notices served by a railroad to withdraw work from a yard crew or in the alternative, reduce the size of the crew from five men to three men, resulted in a major dispute and that the limitations of the Norris-LaGuardia Act would conse-

quently bar issuance of an injunction against the threatened strike arising from the dispute.

In *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 53 (C. A. 10, 1956), cert. denied 341 U. S. 918 (1956), it was "contended that compulsory retirement of railroad workers is not a proper subject for collective bargaining under the Railway Labor Act. \* \* \*" The Court held, in accord with *Inland Steel Corp. v. N. L. R. B.*, 170 F. 2d 247 (C. A. 7, 1948), and *Lamon v. Georgia Southern & Florida Ry. Co.*, 212 Ga. 63, 90 S. E. 2d 658 (1955), that compulsory retirement was a proper subject for bargaining. It properly stated: "The Act is remedial and should be broadly and liberally construed to accomplish the purposes it was designed to meet." 229 F. 2d at 55. And as this Court noted in *N. L. R. B. v. Wooster Division of Borg-Warner*, 356 U. S. 342 (1958) (separate opinion): "Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. *E. g.*, *Labor Board v. J. H. Allison & Co.*, 165 F. 2d 766 (merit increases). \* \* \* Provisions which two decades ago might have been thought to be the exclusive concern of labor or management are today commonplace in such agreements." 356 U. S. at 353, 358.

The decision of the Court of Appeals assumes that the words "rates of pay, rules, or working conditions" in Section 6 of the Railway Labor Act were intended to limit and define the scope of collective bargaining under the Act. (264 F. 2d at 258.) This assumption is contrary to the holding of this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342 (1944), wherein this Court, speaking through Mr. Justice Jackson stated, at page 346:

"Collective bargaining was not defined by the statute which provided for it, but it generally has been

considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

The express language of the Railway Labor Act, the predecessor statutes pertaining to railroad labor beginning with the Act of 1888, and the legislative history of these enactments makes clear the congressional purpose that peace in the railroad industry be maintained through the processes of collective bargaining.

The Railway Labor Act provides:

"It shall be the duty of all carriers \* \* \* and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes \* \* \*" (Sec. 2, First, Railway Labor Act, 45 U. S. C.; Section 152, First); and "*All disputes* \* \* \* shall be considered, and, if possible, decided, with all expedition, in conference \* \* \*" (Ibid. Sec. 2, Second, 45 U. S. C. 152, Second.) \* (Emphasis added.)

The legislative history of the Railway Labor Act confirms its clearly expressed intent that collective bargaining should extend to all matters. Thus in the Committee Report to the House of Representatives, it was stated:

"\* \* \* Disputes \* \* \* are divided into three classes: (a) Disputes over grievances. \* \* \* (b) Disputes over proposed changes in agreements concerning rates of pay, rules of [sic] working conditions. (c) *All other disputes*. \* \* \* *All disputes* must be considered first in conference \* \* \*" (H. Report 328, 69th Cong. 1st Sess., page 3.) (Emphasis added.)

\* Similar language appears in the statutes which preceded it: Section 301, Title III of the Transportation Act of 1920, 41 Stat. 469; Sec. 2, Newlands Act of 1913, 38 Stat. 104; Sec. 2, Erdman Act of 1898, 30 Stat. 425; and Sec. 1, Act of 1888, 25 Stat. 501.

The same intent is expressed in the Committee Report of the Senate\* and in congressional consideration of prior statutes.\*\*

*B. The contemporaneous construction placed on the Railway Labor Act both by railroads and unions for more than three decades is that the Act does not place any limits on the scope of collective bargaining.*

Throughout the many years of collective bargaining which followed the enactment of the Railway Labor Act, the parties have, by their conduct, given meaning and life to the express language of the Act, imposing the obligation upon them to bargain on all matters in order to maintain peace in an industry vital to the nation's welfare.\*\*\*

Before and since 1926 railroads and unions have bargained about a wide variety of subjects touching every aspect of the employment relationship. Extensive recognition has been given especially to the difficult and almost always present problems of job security and job tenure.

\* Senate Report 222, 69th Cong. 1st Sess., page 1 ("any and all disputes . . .") and 67 Cong. Rec. 4505 ("all disputes").

\*\* Transportation Act of 1920: 59 Cong. Rec. 3310, 3328, 8832 and 8842; Newlands Act of 1912: 50 Cong. Rec. 2179, 2433, 2434; Erdman Act of 1898: 29 Cong. Rec. 2388, 27 Cong. Rec. 2795; Act of 1888: 19 Cong. Rec. 3107; see also 18 Cong. Rec. 2375 and 17 Cong. Rec. 2973, regarding a bill substantially the same as the Act of 1888 in the 49th Congress.

\*\*\* It was not until 1953, 27 years after the Railway Labor Act was enacted, that railroads, on a national basis, refused to bargain on the basis that a contract proposal did not present a bargainable issue. That issue, involving a proposed health and welfare plan for employees by the non-operating brotherhoods, was settled by the adoption of such a plan. (*Barnes v. The Akron, Canton & Youngstown Railroad Co.*, 348 U. S. 893.) Significantly our research discloses only one other court case involving a refusal to bargain under the Act based on the nature of the subject matter proposed for bargaining. *McMullan v. Kansas, Oklahoma & Gulf Railway Co.*, 229 F. 2d 50, 53 (C. A. 10, 1956), cert. denied 351 U. S. 918. Non-bargainability as a basis for refusing to confer was not again raised nationally until 1957. For a fuller discussion of this matter see Part V, Appendix to Petitioner's Brief, and summary of instances following conclusion thereof.

In general the essence of the problem is how the fruit of increased production and the consequent burdens of technological unemployment are to be distributed between employees and employers. This problem has been approached in a number of ways beginning with provisions as to the length and term of employment and including seniority provisions, minimum crew requirements, guaranteed mileage, limitations on contracting out of work, severance allowances, supplementary unemployment compensation benefits, guaranteed employment and mutual discussions and joint decision concerning job abolitions.

In the Appendix filed with this brief we have brought together the principal contractual developments in this area in the railroad industry and in industry generally together with relevant historical and economic materials. We invite the attention of the Court to this Appendix for a fuller discussion of the economic aspects of this case.

In this brief we invite the Court's attention to the District Court's finding:

“... Collective bargaining as to the length or term of employment is commonplace. There are a variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads.” (Find. 17, R. 356-357.)

\* In making this finding of fact the District Court in addition to considering the evidence on this issue took judicial notice of the great extent of collective bargaining in this field. Provisions relating to length and duration of employment, dismissal and discharge, job rights in a craft, departmental and plant-wide basis, seniority as a controlling criterion in hiring, promotion, demotion, transfer and lay-offs are standard in collective bargaining agreements throughout the country, including the railroad industry. “The

The Railroad recognized that stabilization of employment was a bargainable subject by its participation in the National Agreement of 1956. That agreement specifically excepts from the operation of a three-year moratorium on certain specified Section 6 notices, notices dealing with stabilization of employment and separation allowances. It expressly provides for the serving of such notices and negotiation of agreements concerning them. (National Agreement, November 1, 1956, Article VI(c), R. 269.) The Railroad further recognized the bargainability of the same subject by negotiating and entering into agreements with most of the non-operating Brotherhoods on its property, not including this Union, for severance pay allowances upon the discontinuance of positions. Severance pay is one method of stabilizing the employee's situation pending his finding another job. The severance pay tides him over during the period of unemployment following discontinuance of position, and discourages dismissals, thereby stabilizing employment. The Railroad further recognized the negotiability of the whole subject of stabilization of employment by insisting upon and having incorporated into the severance pay agreement a three-year moratorium prohibiting service of 30 days' notice relating

negotiation of guarantees of pay or work represents a major area of concern in collective bargaining today. Contracts containing such guarantees amount to about 13 per cent of a balanced random sample of 400, but their coverage extends to two-and-a-half million workers. 2 Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts (BNA), 53:1 (2-22-57). "Roughly a seventh of union agreements grant employees leaving the company separation pay. . . ." *Ibid.* 40:361 (4-5-57). A recent study shows two million workers have come under such plans since 1956, and at least 35% of all employees represented by unions are so covered. 45 C. R. R. 54 (B. N. A. Nov. 1959.) Many such agreements provide for payment of separation pay for job or plant discontinuance. 2 Collective Bargaining Negotiations & Contracts, *supra*, 40:362-366 (4-5-57). Limitations on the right to dismiss employees no longer needed because of technological changes are also found in collective agreements. *Ibid.* 65:121 ff. 66-15-56). See also 1 Werne, Law and Practice of the Labor Contract 72 ff. (1957).

to "stabilization of employment, separation allowance or other similar requests or demands," for all the Brotherhoods signatory to the agreement (Pl. Ex. 13, R. 308).

The fact that the National Agreement of 1956 mentions separately notices concerning separation allowances and notices concerning stabilization of employment indicates that the Carriers signatory to the agreement, including this Railroad, recognized that notices could be served making demands going beyond ordinary separation allowances. (National Agreement, November 1, 1956, Article VI (c), R. 269.) See National Mediation Board Interpretations 72, 72-A, 72-B (January 14, 1959).

The present agreement between the Railroad and the Union contains many standard provisions concerning job security, most of which go back for many years. These include a rule with relation to abolition of positions, requiring the giving of two working days advance notice to the telegraphers affected (Rule 9(a)), the so-called scope rules which give the telegraphers exclusive right to perform certain designated work (Rule 1, etc.), extensive provisions relating to seniority in connection with promotions, demotions, new or reopened positions, vacancies, etc. (Rules 3-11, 13, 17-20, 22-24, 28, 29), provisions requiring free transportation for the employee, his family and household goods, when transferred by order of the company, or when change of residence is required resulting from acceptance of bulletined position (Rule 25), provisions for limitation on reduction of hours or working days per week (Rules 43½-49), provisions against employees being required to suspend work during assigned hours or to absorb overtime (Rule 51), special wage provisions for handling of train orders and other messages of record by other crafts (119-121), special provisions relating to rates of pay and seniority and establishing qualifications for the operation of printing telegraph machines or similar operating devices (pp. 122-125), and

special provisions assigning the work of operating centralized operated control machines to telegraphers (pp. 127-128).

Even if the proposed subject of agreement were novel, that would be no reason for the Railroad's refusal to discuss it: "... effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 347 (1944).

The practical effect of the decision below is to impede, if not nullify, collective bargaining of contract changes in the railroad industry. The contention of non-bargainability would become routine as to virtually all contract proposals other than those concerned with wages. Without a body of law establishing what is or is not bargainable, intervention of the federal courts by injunction would likewise be sought as a routine matter. The end result would be a breakdown of the administration of the Railway Labor Act and a destruction of the peaceful processes developed thereunder.

**4. The Norris-LaGuardia Act Bars the Issuance of an Injunction Even If It Be Assumed Arguendo That the Labor Dispute Here Involved Is Not an Issue With Respect to Which Bargaining Is Mandatory Under the Railway Labor Act.**

The basic question in this case is whether the Norris-LaGuardia Act prohibits the issuance of an injunction. The question whether the subject of dispute is one with respect to which the Railway Labor Act imposes a duty to bargain is also involved, but in limited fashion. Because the opinion of the Court of Appeals misconceived the role of that question in the case it is necessary to clarify the matter here.

The fact that the Railway Labor Act imposes a duty to bargain with respect to the proposed agreement is important here for the following reasons:

1. Since the subject was one with respect to which there was a duty to bargain, imposed by the Railway Labor Act, the dispute is clearly a labor dispute within the meaning of Section 1 of the Norris-LaGuardia Act. This is the most important consequence of the question under the Railway Labor Act. We have stated in Part I, 3, *supra*, the reasons which require the conclusion that there was a duty to bargain under that Act, and need not repeat them here.

2. Since the Railroad has not complied with the duty to bargain imposed by the Railway Labor Act, the injunction is in any event barred by Section 8 of the Norris-LaGuardia Act, denying injunctive relief to any complainant "who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration." See Part II, *infra*.

3. Since the Union has exhausted the appropriate remedies available to it under the Railway Labor Act, and the Railroad has persistently flouted the provisions of the Act, the Union is perfectly free to discontinue a relation the terms of which are unacceptable; the acts enjoined are entirely lawful.

It is even more important to emphasize the negative aspect of the role of the question under the Railway Labor Act. In its opinion the Court of Appeals said:

"Thus where a Section 6 Notice dealing with one of the enumerated subjects is given by a union to a carrier, a 'labor dispute' within the meaning of the Norris-LaGuardia Act has arisen. Conversely, where the Section 6 Notice does not pertain to 'rates of pay,

rules, or working conditions', there is no 'labor dispute', and the provisions of the Norris-LaGuardia Act with reference to injunctions are not applicable." 264 F. 2d at 258.

The present case concerns a labor dispute, relating to "terms or conditions of employment" within the Norris-LaGuardia Act. It is also a dispute within the Railway Labor Act. It is not true, however, that coverage by the Railway Labor Act is a prerequisite to the applicability of Norris-LaGuardia's proscription of the injunctive remedy. We do not believe that there is a significant difference between the coverage of the two acts, except as this Court has established a difference in *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 40 (1957). By assuming identity of coverage; however, and by gratuitously engrafting upon the Railway Labor Act a concept of disputes not within the area in which the parties are under the statutory duty to bargain, the Court of Appeals paved the way for its conclusion that the dispute involved here was not within the coverage of either act.

The policy of Norris-LaGuardia is basic and comprehensive. It is not limited to those cases in which there is a duty to bargain. While the area within which injunctions are prohibited cannot be narrower than that in which bargaining is required, it may be broader. If one can imagine a case in which there is no duty to bargain under the Railway Labor Act, but which involves a labor dispute within the meaning of Norris-LaGuardia, the consequence is not that injunction will issue, but that injunction will issue, if at all, strictly in conformity with the conditions of Norris-LaGuardia. The Court of Appeals seriously impeded clear analysis of the case by its assumption that if there was not a duty to bargain under the Railway Labor Act an injunction should issue as of course, regardless of the Norris-LaGuardia Act.

The concept of a dispute not within the scope of the duty to bargain was borrowed by the Court of Appeals from the Labor Management Relations Act. For its proposition that the dispute here was "not within the scope of mandatory bargaining," and hence not within the provisions of Norris-LaGuardia, the court cited *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958). There an employer insisted, as a condition of entering into a collective-bargaining agreement, upon the inclusion of (1) a "ballot" clause calling for a pre-strike secret vote of employees, union and nonunion, and (2) a "recognition" clause which excluded, as a party to the contract, the international union which was the certified representative. The Board held that both these clauses related to matters outside the scope of mandatory collective bargaining as defined in Section 8 (d) of the Labor Management Relations Act (referring to "wages, hours, and other terms and conditions of employment"), and that the employer's insistence upon their inclusion as the price of agreement on any contract was an unfair labor practice. This Court affirmed, four Justices disagreeing as to the "ballot" clause.

As this Court has had occasion to note, "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act \* \* \*." *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 31-32, n. 2 (1957). The term "unfair labor practice" is not used in the Railway Labor Act. That Act establishes no such agency as the National Labor Relations Board, empowered to determine what constitutes an unfair labor practice and hence, under this Court's decision in the *Borg-Warner* case, to exercise a degree of control over the issues which are thought to be appropriate subjects for

mandatory bargaining. By its decision below the Court of Appeals has in effect read a provision concerning unfair labor practices into the Railway Labor Act, and has set itself up as the agency to determine what are and what are not appropriate subjects of bargaining. In so doing, it has announced that its own determinations of that question are controlling with respect to the scope of the protection which the Norris-LaGuardia Act provides against government by injunction.

The *Borg-Warner* case sharply divided the members of this Court. Referring to the phrase "other terms and conditions of employment," Mr. Justice Harlan said in his separate opinion: "The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation." *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 351, 353 (1958). In his view, the Board "was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies" of the Wagner and Taft-Hartley Acts (*Ibid.* at 354). We are not concerned here with the correctness of that decision. We are vitally concerned, however, with the fact that this Court's decision of a close question under the Labor Management Relations Act has been misapplied to a dispute under the Railway Labor Act with no justification whatever and in such a way as to aggravate the unfortunate consequences which Mr. Justice Harlan anticipated.

The Court of Appeals has misinterpreted the *Borg-Warner* case in such a way as to produce consequences in the railway labor field which were certainly not intended by those who joined in the majority opinion in *Borg-Warner* in the more general field of labor relations to which the decision relates. This Court held only that the matters covered by the "ballot" and "recognition"

clauses were not within the scope of the duty to bargain imposed by the Labor Management Relations Act; it did not hold that bargaining with respect to those matters was forbidden. "As to [matters not within the scope of mandatory bargaining], however, each party is free to bargain or not to bargain \* \* \*." (356 U. S. at 349.) "Each [of the two controversial clauses] is lawful in itself. Each would be enforceable if agreed to by the unions." (*Ibid.*) The fault of the employer was a narrowly defined one: he might permissibly propose these clauses and bargain over them; his sole fault was in refusing to agree to any contract not containing them. It was this refusal which was construed as a refusal to bargain on matters within the scope of mandatory bargaining. Without such a refusal, the employer would have been free to back his bargaining over the same clauses with his economic power. If a strike had resulted from failure to agree upon one or the other of the clauses, the Norris-LaGuardia Act would have prohibited injunction; there is not the slightest intimation in *Borg-Warner* to the contrary.

Yet the Court of Appeals held that the mere proposal by the Union of a clause relating to job tenure, followed by recourse to its economic position upon the refusal of the Railroad to bargain on the question, deprives the Union of the protection of the Norris-LaGuardia Act. Let us assume for the moment—of course without conceding—(1) that by implication the Railway Labor Act contains some analogue of the Labor Management Relations Act's concept of "unfair labor practices," of which a refusal to bargain on matters within the scope of "mandatory collective bargaining" is one; and (2) that the proposal relating to discontinuance of positions contained in the Union's Section 6 notice was not within the range of subjects with respect to which bargaining was mandatory. The Union was nevertheless free to make the proposal. There was in

existence a collective bargaining agreement between the parties unquestionably relating to matters within the scope of mandatory bargaining, none of which were involved in the proposal. The Union was not in the position of refusing to bargain on "mandatory" issues unless and until agreement should be reached on this "non-mandatory" one; only the issue of job abolition was involved. On the hypotheses stated, each party was free to bargain on the proposal or not, and to enforce its position by recourse to economic resources—in the employment of which the Union would be protected against injunction by the Norris-LaGuardia Act. Yet the Court of Appeals said:

"Accordingly, the issue here is whether the Union's demand falls within the scope of mandatory bargaining. If it does not, the injunction may and should issue." 264 F. 2d at 258.

In this curt and elliptical passage the Court of Appeals decrees, in effect, that by making a proposal which it was perfectly free to make even under the *Borg-Warner* doctrine, and in resorting to the right to strike in order to induce the Railroad to bargain over the proposal, the Union was somehow guilty of an "unfair labor practice" (not described by the Railway Labor Act), and that the penalty—not prescribed by any law—for this practice is exclusion from the protection of Norris-LaGuardia.

The error is compounded by the Court of Appeals' ignoring without discussion the well established rule that the Norris-LaGuardia Act precludes injunctions in suits by private parties to enjoin strikes growing out of unfair labor practices. *California Association of Employers v. Building & Construction Trades Council, et al.*, 178 F. 2d 175 (C. A. 9, 1949) (Company charged Union refused to bargain in good faith); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (C. A. 4, 1948); *Teamsters v. Brewery Workers*, 106 F. 2d 871 (C. A. 9, 1939); *Wilson*

*Employees' Representation Plan v. Wilson & Co.*, 53 F. Supp. 23 (S. D. Cal. 1943); *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625 (D. Minn. 1945).

The most alarming and least excusable aspect of this error is the presumptuous judicial curtailment of the national policy stated in the Norris-LaGuardia Act—a curtailment which finds not a trace of justification in the *Borg-Warner* case. That dealt only with unfair labor practices under the Labor Management Relations Act and *did not involve injunctions or the Norris-LaGuardia Act in any way*. Moreover, the Labor Management Relations Act's concept of "unfair labor practice" and the concomitant distinction between "mandatory" and "permissible" subjects of bargaining have no place in the different plan devised by Congress to regulate railway labor disputes. Under the Railway Labor Act it is "the duty of all carriers \* \* \* to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle *all disputes*, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce \* \* \*." Section 2, First. (Emphasis supplied.) Such comprehensive language leaves no room for a sector in which the parties are "free to bargain or not to bargain." 356 U. S. at 349. Either the subject of the proposal is one on which agreement would be unlawful; or it is one with respect to which bargaining is mandatory. In the Railway Labor Act, Congress has comprehensively required resort to collective bargaining on all lawful proposals as a means of avoiding work stoppages; it has established no agency with power to determine that there are some matters with respect to which collective bargaining is merely permissible. As we have shown in Part I, 3, *supra*, in the judgment of Congress, collective bargaining in this field is so vital that it

is obligatory as to all matters which may lawfully be the subject of agreement.

The refusal of the Court of Appeals to recognize the duty of the Railroad to bargain is based upon (1) repeated characterizations of the Union proposal as a demand for "veto" power; (2) unsupported assertions that the discontinuance of positions is an inviolable prerogative of management; and (3) reliance on cases dealing with proposals with respect to which agreement would be illegal or immoral, and which therefore have no bearing on the proposal of the Union in this case.

In the course of its relatively brief discussion of the legal problem presented, the court referred to the Union's proposal no less than four times as a demand for "veto" power (264 F. 2d at 258, 259), and in still another place said that "the Union's proposal, if accepted, would place in its hands the power to prevent any undertaking by North Western to meet competition by modernizing its operations in the light of technological development \* \* \*." (*Id.*, at 258.) Such language is significant less for its intemperance than for its refusal to recognize or understand the process of collective bargaining which is the cornerstone of national labor policy. The Union did not and could not "demand" a "veto" power. Under the Railway Labor Act the Railroad is not required to agree to any proposal to amend the agreement. It is only required to bargain. The Union asked that it bargain over a proposed change in the contract. The proposed change, if agreed to, would have had no self-executing effect with reference to the abolition or continuance of jobs; by its own terms it would have required further bargaining with reference to any specific plan for job abolition. Had the Railroad, in compliance with its duty under the Act, bargained over the proposal, and had there been failure to reach agreement, the machinery provided by the Act would have gone into

operation: mediation and conciliation, possible arbitration, and finally possible recommendations by an emergency board appointed at the discretion of the President. This is the process of free collective bargaining; this is not a context in which either party is in position to "demand" a "veto."

The court's determined obliviousness to the true character of the proposal suggests that the court assumed (1) that the Union would at no stage of the bargaining process agree to a modification of the proposal, (2) that if a strike should occur because of the failure to reach agreement on the proposal the Railroad would lose the strike and have no alternative except to agree, and (3) that, if the proposal should become part of the collective bargaining agreement, the Union would never agree to the abolition of any existing positions. Perhaps the court assumed that the Railroad has no bargaining power. Since, however, the entire history of collective bargaining shows that original demands are almost invariably altered in the bargaining process, it is more likely that the court was simply unwilling to concede to the Union the right which Congress has given it—the right to have a voice in decisions affecting job tenure and measures to stabilize employment. The influence which the Union exerts on such matters through the process of collective bargaining is in no sense a veto, and to refer to it as such is to exhibit lack of understanding of, or hostility to, that process itself.

Closely related to this stigmatizing of the Union's proposal are the repeated references by the court to the question covered by the proposal as a managerial "prerogative." The court speaks of "the right to manage and control the administrative functions of its business enterprise" (264 F. 2d at 258); of the "attempt by the Union to arrogate to itself the prerogatives that have been tra-

ditionally and rightfully management's" (*ibid.*); and of an attempt to "usurp legitimate managerial prerogative." (*id.* at 259.) These unsupported aspersions are significant less for their betrayal of the court's bias than for their demonstration of the court's indifference to the history and function of collective bargaining as an instrument of national labor policy. Practically all the subjects of modern collective bargaining were once regarded as matters within the managerial prerogative. The essence of collective bargaining is that matters once decided unilaterally shall be determined bilaterally. *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 353, 358 (1958) (separate opinion). The Court of Appeals in effect held that employment problems precipitated by technological advance are to be decided arbitrarily and unilaterally by virtue of the "prerogative" of management, and are not to be decided cooperatively in accordance with Congressional design through the collective bargaining process.

In concluding this portion of the discussion we must once again emphasize that, even if the court below were not so egregiously in error in its interpretation of the Railway Labor Act, it would still be fatally wrong in its conclusion that Norris-LaGuardia does not apply. For even if the subject covered by the Section 6 notice is not one with reference to which the Railroad has a statutory duty to bargain, the effect is only to bring back into effect the conditions which existed before regulation of labor-management relations imposed the duty to bargain. There would still be the right to propose subjects of agreement; there would still be the right to strike; there would still be the Norris-LaGuardia Act's prohibition against the use of the injunction against strikes. The notion that the scope of the Norris-LaGuardia Act's limitation of federal court jurisdiction is narrowed by the scope of "mandatory"

collective bargaining under the Railway Labor Act—even if there is assumed to be a limit on the scope of that duty to bargain—is a figment of the court's imagination.

## II.

**SINCE THE RAILROAD FAILED AND REFUSED TO COMPLY WITH ITS OBLIGATION, IMPOSED BY THE RAILWAY LABOR ACT, TO BARGAIN CONCERNING THE PROPOSED CONTRACT CHANGE, INJUNCTIVE RELIEF IS BARRED BY SECTION 8 OF THE NORRIS-LA GUARDIA ACT.**

The record in this case plainly shows that the Railroad persistently and intransigently refused to discuss the contract change proposed in the Union's Section 6 notice.

Section 8 of the Norris-LaGuardia Act prohibits the injunction. The proposal of the Union was made in good faith. That there was a genuine dispute there can be no doubt. If it should be ultimately and authoritatively determined that the issue was not a bargainable one under the Railway Labor Act, certainly it cannot be said that on that question there was not room for a reasonable difference of opinion. Yet the response of the Railroad to the serious problem tendered in good faith by the Union's Section 6 notice was one of obdurate refusal to discuss the matter in order to avert what the Railroad itself characterizes as a major interruption of commerce. This obduracy and this refusal to participate in any way in the processes prescribed by the Railway Labor Act for the settlement of disputes disqualifies the Railroad as an applicant for injunctive relief. *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

## III.

**EVEN ASSUMING THAT THE SUBJECT OF THE UNION'S SECTION 6 NOTICE WAS NOT ONE ON WHICH THE RAILWAY LABOR ACT REQUIRES THE PARTIES TO BARGAIN, SECTION 7 OF THE NORRIS-LA GUARDIA ACT PROHIBITS THE ISSUANCE OF AN INJUNCTION SINCE THE FINDINGS REQUIRED BY THAT SECTION WERE NOT MADE AND CANNOT BE MADE BY THE DISTRICT COURT.**

The subject of the Union's Section 6 notice was one on which the Railway Labor Act required the parties to bargain. But if this were not so—if it were true, as the Court of Appeals held, that the subject is within some area in which bargaining is "permissible" but not mandatory—still the mandate of the Court of Appeals, directing that a permanent injunction issue, is in the teeth of the Norris-LaGuardia Act. Obviously, as the *Borg-Warner* case itself demonstrates (356 U. S. 342), there may be a labor dispute although there is not a statutory duty to bargain. And the Norris-LaGuardia Act declares a fundamental and sweeping national policy against the use of the injunction in labor disputes. No injunction may issue except in conformity with Section 7 of that Act. Here we emphasize that among the findings that are prerequisite to the issuance of an injunction are these:

1. The district court must find that *unlawful acts* have been threatened or committed, and will be committed or continued unless restrained.

2. The district court must find that substantial and irreparable injury to complainant's *property* will follow.

3. The district court must find that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Not one of these findings was made by the district

court; not one of them could be made on this record, nor on the basis of any further hearing; the facts required to be found are not even alleged in the complaint nor were any such findings requested by respondent.

The case was tried on the theory that Norris-LaGuardia was not applicable. The decision of the Court of Appeals, however, viewed in the light most favorable to the Railroad, holds no more than (1) that the issue was not one with respect to which the Railway Labor Act makes bargaining compulsory and (2) that the orders of the state regulatory commissions superseded the provisions of the Railway Labor Act. From these propositions, even if they were sound, it does not follow that injunction may issue. Subject to the exceptions noted in Part I, *supra*, Section 7 of the Norris-LaGuardia Act specifies the sole conditions under which an injunction may be granted in a labor dispute. *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 329 (1938).

#### IV.

#### **THE DISTRICT COURT LACKED JURISDICTION TO ENTERTAIN THIS ACTION REGARDLESS OF THE APPLICABILITY OF THE NORRIS-LA GUARDIA ACT.**

##### **A. Diversity Jurisdiction Does Not Exist.**

The Railroad's principal place of business is Chicago, Illinois. (R. 5.) The individual petitioners are citizens of the State of Illinois. (R. 5.) Jurisdiction cannot, therefore, be predicated on 28 U. S. C. § 1332, as amended July 25, 1958, prior to the filing of this action. (R. 3.)

##### **B. Federal Question Jurisdiction Does Not Exist.**

Although the Railroad's complaint asserts that this is a case arising under federal law (R. 5), nowhere in the complaint or in the course of the proceedings in the Dis-

trict Court, in the Court of Appeals, or in this Court has it shown any basis for its assertion that its claim to injunctive relief is based on any federally created right within Section 1331 of the Judicial Code, 28 U. S. C. § 1331. And in the absence of such basis for relief, the District Court was not empowered by Congress to entertain this litigation.

It would be an imposition on this Court to suggest that it has already resolved the specific question involved here. In 1944, the Court treated the question as an open one, *Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50, 54-55, n. 5 and it has not passed on the issue since that time. And, so far as petitioners have discovered, only one Court of Appeals has ruled on the question since then. In *Trainmen v. New York Central R. R.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied 355 U. S. 877 (1958), which is distinguishable from this case in that the union there had not served a section 6 notice nor exhausted its remedies under the Railway Labor Act, 246 F. 2d at 115, a divided Court of Appeals found jurisdiction to entertain an action for an injunction against a strike on the ground that the railroad was enjoined by Congress to provide railroad services under the Interstate Commerce Act. The Court of Appeals relied on the decision of the Seventh Circuit in the *Toledo* case, *supra*, in which on review this Court announced that the question need not be decided because judgment could rest on other grounds. In the *New York Central* case, Judge (now Mr. Justice) Stewart succinctly pointed to the failure of the Railroad to specify any basis in federal law for invoking the federal judicial power:

"In my view federal jurisdiction does not exist in this case. Citizenship of the parties is not diverse. The controversy certainly does not arise under the Constitution, and I cannot perceive that it arises under

the laws of the United States. Believing that the complaint should be dismissed for want of federal jurisdiction, I do not reach the merits." (246 F. 2d at 122.)

Judge Stewart was in turn relying on the dissent of Judge (later Mr. Justice) Minton in the *Toledo* case. 132 F. 2d at 272-74.

The case of *Trainmen v. Chicago River & Indigna R. R.*, 353 U. S. 30 (1957), is inapposite for two reasons. First, the right of the railroad there was predicated on the Railway Labor Act's requirement that disputes over contract interpretation be decided by the Adjustment Board. As Mr. Chief Justice Warren said in that case: "The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board." 353 U. S. at 31. Second, no issue of federal court jurisdiction was raised in that case, and it certainly did not purport to resolve any such question.

The failure of authority requires resort to first principles. These clearly lead to the conclusion that there is no federal question jurisdiction in this case. The first of these principles was stated by Mr. Justice Stone in *Healy v. Ratta*, 292 U. S. 263, 270 (1934): "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." It is not the burden of the petitioners to demonstrate the absence of federal jurisdiction, but rather the burden of the Railroad to establish clearly that the federal judicial power has been properly invoked. No clear line has been drawn by this Court in defining a federal question. But the substance of the rule has become clear through the process of adjudication: the "essential purpose" of the decisions of this Court is "to hold the meaning of the statute limited to cases where

the plaintiff's cause of action, the rule of substance under which he claims the right to have a remedy, is the product of the federal law." Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.*, 216, 225 (1948). The fact that federal elements are involved is not sufficient to ground federal-question jurisdiction. *Gully v. First National Bank*, 299 U. S. 109 (1936).

There are three possible bases for asserting the existence of federal question jurisdiction here. One is the notion that because the Union's right to be free of the injunction ordered by the Court of Appeals rests on the terms of the Norris-La Guardia Act and the Railway Labor Act, the Railroad has raised a federal question by asserting a position violative of these statutory rights. But it has long been clear that the fact that a defense is predicated on federal law does not give a plaintiff the right to invoke the jurisdiction of the federal courts. *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149 (1908).

A second is the possibility that, though nowhere in the Railway Labor Act is there specific basis for the relief sought here by the Railroad, yet somewhere in the interstices of the policy underlying that statute is to be found a basis for the right to an injunction. This Court has long since rejected such a possibility. Typical of its construction of the Railway Labor Act is the language used in *General Committee v. M. -K. -T. R. R.*, 320 U. S. 323 (1943). There Mr. Justice Douglas, speaking for the Court, said:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be ex-

pected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess. p. 2. Courts should not rush in where Congress has not chosen to tread.

"We are here concerned solely with legal rights under this federal Act which are enforceable by courts. For unless such a right is found it is apparent that this is not a suit or proceeding arising under any law regulating commerce over which the District Court had original jurisdiction by reason of § 24(8) of the Judicial Code, 28 U. S. C. § 41(8). Cf. *Puerto Rico v. Russell & Co.*, 288 U. S. 476, 483; *Gully v. First National Bank*, 299 U. S. 109; *Peyton v. Railway Express Agency*, 316 U. S. 350, 352. When a court has jurisdiction it has of course authority to decide the case either way.' *The Fair v. Kohler Die and Specialty Co.*, 228 U. S. 22, 25. But in this case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer." (320 U. S. at 337-38.)

Finally, it is suggested that the obligation of the Railroad to provide railroad services under the terms of the Interstate Commerce Act, 49 U. S. C. § 1, creates a basis for the Railroad's resort to the federal courts whenever it comes in conflict with a labor union, or indeed with any party whose services or supplies are essential to the maintenance of its operations. The answer to this is clear. In the first place any such construction of the Interstate Commerce Act would fly in the face of the expressed policy of Congress as stated in the Railway Labor Act. See, e.g., *General Committee v. M. & T. R. R.*, *supra*; Mr. Justice Frankfurter, concurring, in *Pennsylvania R. R. v. Rychlik*, 352 U. S. 480, 498 (1957):

"The governing outlook for construing the Railway Labor Act is hospitable realization of the fact that it is primarily an instrument of industrial government

for railroading by the industry itself, through the concentrated agencies of railroad executives and the railroad unions. \* \* \* The dominant inference that the Court has drawn from this fact is exclusion of the courts from this process of collaborative self-government."

Moreover, it is hardly necessary to parade the absurd consequences, which are not imaginary, were this Court to suggest that whenever a railroad does not succeed in negotiating the purchase of supplies or services on the terms which it desires, it may come into federal court to compel, by injunction, the party with whom the railroad is dealing to accept the terms which the railroad would impose—on the ground that the railroad could not otherwise comply with the terms of the Interstate Commerce Act. There is no hint, either in the language or the policy of the Interstate Commerce Act, that the federal courts were to be put to this use by the railroads. It is only a few days since this Court recognized that Congress could, if it would, announce the terms and conditions under which labor unions might be enjoined from striking because of the adverse effects on the nation's economy. [*United Steelworkers of America v. United States*, ..... U. S. .... (Nov. 7, 1959).] Certainly the Court is not ready to assume that the same result should be secured, not only for a period of eighty days but indefinitely, without any such Congressional warrant. In the Railway Labor Act Congress has set forth a specific Executive procedure for temporary deferral of strikes causing national emergencies—i. e., Section 10. The Executive branch has not regarded this impending strike as calling for exercise of that power.

## V.

**THE ORDERS OF THE REGULATORY COMMISSIONS OF  
SOUTH DAKOTA AND IOWA CANNOT ALTER THE OBLI-  
GATION OF THE RAILROAD WITH RESPECT TO COL-  
LECTIVE BARGAINING UNDER THE RAILWAY LABOR  
ACT.**

Congress, through the Railway Labor Act, has commanded the Railroad as well as the Union to settle their collective bargaining disputes through the machinery prescribed by the statute. The Railroad now claims to be relieved of this Congressionally imposed duty by reason of having secured permission from two State regulatory agencies to decide unilaterally what the Railway Labor Act requires to be decided through collective bargaining. This Court has, in recent Terms, made it abundantly clear that a State may not exempt the Railroad from duties to bargain collectively with the employees, duties imposed upon it by Congress.

In *Teamsters Union v. Oliver*, 358 U. S. 283 (1959), an injunction which had been secured from the Ohio courts, preventing the effectuation of a provision in a collective bargaining agreement between motor carriers and a union on the ground that the provision was violative of the State anti-trust laws, was upset by this Court on the ground that the State had no power thus to interfere with the collective bargaining processes ordained by Congress. In so doing, this Court announced principles so clearly controlling the issue raised by the Railroad here that extensive quotation from the *Oliver* case seems appropriate.

"Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6. The purposes of the Acts are served by bringing the parties to-

gether and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty [citation omitted]; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. [Citation omitted.] We believe that there is no room in this scheme for the application here of this state policy limiting the solution that the parties' agreement can provide to the problems of wages and working conditions. Cf. *California v. Taylor*, 353 U. S. 553, 566-567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. [Citations omitted.] The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. [Citation omitted.] Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an anti-trust law. " \* \* \* Congress has sufficiently expressed its purpose to \* \* \* exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade." *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 481. [Ellipses in original.] We have not here a case of a collective

bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it." 358 U. S. 295-97.

The applicability of these principles to cases arising under the Railway Labor Act is underlined by the references of the Court to Railway Labor Act cases, and especially to *California v. Taylor*, 353 U. S. 553 (1957). In that case, California contended that its own civil service laws should govern employer-employee relationships on the State-owned belt railway. This Court rejected that proposition in spite of the very special interest the State asserted, and held that the collective bargaining processes of the Railway Labor Act must be followed even by the State of California in its role as railroad-employer. Mr. Justice Burton, speaking for all of the Justices who participated, said:

"\* \* \* the Act's policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively with the State concerning terms and conditions of employment which are fixed by the State's civil service laws. This state civil service relationship is the antithesis of that established by collectively bargained contracts throughout the railroad industry. '[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.' *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, *supra* (321 U. S. at 347). If [as the Court held] the Federal Act applies to the

Belt Railroad then the policy of the State must give way." 353 U. S. at 559-60.

This quotation was followed by the following footnote, equally relevant to this case:

"For cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, see *Napier v. Atlantic C. L. R. Co.*, 272 U. S. 605 (Boiler Inspection Act); *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439 (Safety Appliance Act); *Erie R. Co. v. New York*, 233 U. S. 671 (Hours of Service Act); *Second Employers' Liability Cases*, 223 U. S. 1 (Employer's Liability Act). Cf. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, to the effect that the Railway Labor Act did not preclude a State from establishing minimum health and safety regulations in the interests of railway employees. That case did not concern a conflict between federally protected collective bargaining and inconsistent state laws." 353 U. S. 560, n. 8.

It is thus patent from the decisions of this Court that any possible conflict between the orders of the State regulatory commissions and the Railway Labor Act must be resolved in favor of the national statute. The States are not empowered to detract from the national scheme for resolution of disputes between management and labor by declaring unlawful the end to which the contract negotiations are directed.

Moreover, even if the State could make such declarations of invalidity, they would not suffice as a basis for invoking the equity jurisdiction of the federal court to issue an injunction against a strike. For Section 4 of the Norris-LaGuardia Act condemns such an injunction even where the State has the power to make the objective of the strike illegal. As Judge Biddle said for the Third Circuit in *Wilson & Co. v. Birl*, 105 F. 2d 948, 950-51 (C. A. 3, 1939):

"... Appellant argues that the acts of the union are

unlawful under Pennsylvania law—striking for a closed shop, coercion of appellant's customers not to deal with it, the acts of violence (even though none were proved to have been authorized), picketing in greater numbers than calculated merely to publish the existence of the dispute. It is not necessary for us to discuss whether or not Pennsylvania law condemns these activities, although it may be pointed out that the legality of the closed shop is established by statute, and the propriety of a strike to enforce it was recently recognized by our court. For, as pointed out by the court below, § 4 of the act, 29 U. S. C. A. § 104, enumerates certain acts not subject to injunctive relief. The test is objective; not the purpose or intent of the acts sought to be restrained, and not even their illegality; but whether they come under § 4."

Thus, the Railroad certainly cannot succeed in this action even if the State regulatory commissions' orders were in conflict with the objectives sought to be achieved by the Union here. The fact of the matter is that there is no such conflict.

No State law and no order of any State regulatory commission conflicts with the duty of the Railroad to bargain concerning the proposal made in the Section 6 notice. Not even the South Dakota order in its final form purported to do more than approve the Railroad's request for permission to abandon certain stations. And, indeed, the Railroad has acknowledged that the orders of both the Iowa and South Dakota Commissions were merely permissive and not mandatory. (Respondent's Brief in Opposition, pp. 13 and 15.) The South Dakota order on which the Railroad places such heavy reliance included the following:

"Accordingly we deem it desirable to clarify, and we hereby amend our Findings and Order so as to eliminate and modify any statement therein which may be construed as an adjudication of the validity of or an interpretation or application of any labor agreement,

or as a directive to violate any contract which may in fact exist or to circumvent the Railway Labor Act in connection with the execution of our Order \* \* \* (R. 215.)

And the Counsel for the Public Utilities Commission and its members made this statement to the South Dakota Circuit Court:

"Correctly construed the Commission's Order does not conflict with the Railroad Labor Act [*sic*]. The requirement in the Order for a progress report after the expiration of 120 days opened the door to any contingency which may arise, including negotiations, strike, federal intervention, proceedings before the Mediation Board, Adjustment Board, or otherwise, in putting the Central Agency Plan into effect." (R. 335.)

## VI.

### **RULE 62(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE DID NOT AUTHORIZE THE DISTRICT COURT TO ISSUE AN INJUNCTION PENDING APPEAL.**

By holding *Norris-LaGuardia* inapplicable to the instant case, the Court of Appeals implicitly ruled that the District Court had not erred in granting an injunction against a strike pending the disposition of this case on appeal. The Court of Appeals was in error on the principal question and equally in error in not ruling that the injunction pending appeal was invalid.

The trial judge concluded as a matter of law, based on the facts disclosed by the evidence after extended hearings, that he was without jurisdiction to enjoin the proposed strike beyond September 19, 1958. (R. 358.) Accordingly, a decree was entered on September 8, dismissing the complaint and denying all relief except for the injunction order expiring September 19, 1958 (R. 359.) Following the entry of the decree, on motion of the Railroad, the order of

September 16, 1958 was entered enjoining the petitioners from striking pending determination by the Court of Appeals of the Railroad's appeal. (R. 371.) The order recites that it was entered under Rule 62(c) of the Federal Rules of Civil Procedure.

That order of September 16, 1958, plainly violates the express provisions of Rules 65(e) and 82 of the Federal Rules of Civil Procedure and the Norris-LaGuardia Act, which the trial court held to be applicable. The prohibitions of Norris-LaGuardia are phrased explicitly as a withdrawal of jurisdiction. The general prohibition of § 1 is reinforced by the specific provisions of § 4, which bans the issuance of injunctions against strikes and acts in aid of strikes. Again the prohibition is cast in the form of a withdrawal of jurisdiction. Even § 7, which does permit the issuance of injunctions in certain limited circumstances, commences with language denying jurisdiction except where the court, after hearing, makes five prescribed findings—findings not made here.

The draftsmen of the Federal Rules of Civil Procedure took special pains to make certain and specific that the Rules should not be considered as in any way modifying the provisions of the Norris-LaGuardia Act. This was done in Rule 65(e). In its present form Rule 65(e) reads as follows:

“Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.” (Fed. Rules Civil Proc., Rule 65(e); 28 U. S. C. A.)

The form of Rule 65(e) at the time of its original adoption in 1937 was as follows:

"Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of August 24, 1937, c. 754, § 3, relating to actions to enforce the enforcement of acts of Congress." (See Fed. Rules Civil Proc., note on 1948 Amendment following Rule 65 (e), 28 U. S. C. A.)

The present form of 65 (e) is a result of a 1948 amendment. Instead of reference to specific statutes, *i. e.*, Norris-LaGuardia and the Clayton Acts, the statutes are described in general terms to avoid necessity for revisions to accommodate legislative changes and did not change the intent. This is made clear by the Committee note to the 1948 amendment to subdivision (e), which provides:

"Specific enumeration of statutes dealing with labor injunctions is undesirable due to the enactment of amendatory or new legislation from time to time. The more general and inclusive reference, 'any statute of the United States', does not change the intent of subdivision (e) of Rule 65, and the subdivision will have continuing applicability without the need of subsequent readjustment to labor legislation." Committee Note of 1948 Amendment, Moore's Federal Practice (1955). Vol. 7, p. 1609.

In the hearings before the House Judiciary Committee on March 2, 1937, Joseph A. Padway, Chief Counsel, American Federation of Labor, questioned whether the language in

Rule 65 (e) relating to temporary restraining orders and preliminary injunctions was intended to limit the scope of the rule. For example, he asked whether the rule was to be applied to permanent injunction decrees. In the course of his testimony he stated: "We want to be sure that the rules do not impinge on the rules already provided in the Norris-LaGuardia Act in any respect." (Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, Third Session, pp. 49-50.)

Major Edgar B. Tolman, Secretary of the Advisory Committee on Rules of Civil Procedure, appointed by the Supreme Court explained Rule 65(e) as follows:

"Rule 65 deals with injunctions. With meticulous care, the provisions of the existing law have been continued and incorporated into the rule. Some question has been raised as to the construction of subdivision (e) of this rule which says—

"These rules do not modify the Act of October 15, 1914, \* \* \* [this and other acts, including the Norris-LaGuardia Act are here enumerated] \* \* \* relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee \* \* \*

"The point has been made that perhaps the words 'relating to temporary restraining orders and preliminary injunctions' limit the rule to those subjects only and do not keep in effect the other provisions of the Norris-LaGuardia Act and the other enumerated acts in regard to the substantive rights of the party and final permanent injunction in labor cases. To one who is familiar with the method adopted throughout these rules of citing the statute by chapter and paragraph and then inserting a short phrase to indicate the general character of the statute, it is readily apparent that these words are merely descriptive and are not words of limitation. This interpretation is further fortified by the evident care manifested in the rule to retain without change all the provisions of the Federal statutes in regard to this important subject." (*Ibid.*, pp. 125-126.)

After arrangements were made for discussion between the representative of the labor organizations and Major Tolman, representing the Advisory Committee, a letter was placed into the record of the hearings from William D. Mitchell, Chairman of the Supreme Court Advisory Committee. (*Ibid.*, pp. 162-164.) This letter reads in part:

"The first thing that is obvious is that most of the provisions in the statutes [Clayton and Norris-LaGuardia Acts] relate, not to matters of procedure but to matters of substantive right, in that they state the facts and conditions which must exist before injunctions can be granted. These new rules of civil procedure have nothing to do with matters of substantive right. The statute under which they are issued expressly provides that 'said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant,' and any rule that was in conflict with this provision of the statute would be void. Furthermore, the rules have been drafted with meticulous care to prevent any interference with substantive right, and to limit their scope to pleading, practice and procedure."

"In addition to what I have said, it will be noted that subdivision (e) states 'these rules do not modify the act of October 15, 1914,' etc. It does not say merely that the rules do not modify these provisions of the acts relating to temporary restraining orders and preliminary injunctions. In this respect it is in contrast with the following clause relating to interpleaders. The phrase 'relating to temporary restraining orders and preliminary injunctions' is merely the description of the act and does not limit the saving clause." (*Ibid.*)

Any possible doubt as to the meaning of the language used in Rule 65(e) was removed by the Advisory Committee by its note to Rule 65(e): "The words 'relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee' are words of

description, not of limitation." (Fed. Rules Civil Proc., Notes of Advisory Committee on Rules, following Rule 65, 28 U. S. C. A.)

The way in which the addition of this note came about and the construction placed on the note by the Committee on the Judiciary of the House of Representatives is summarized in the Report of its Chairman on the Rules of Civil Procedure for the District Court of the United States as follows:

"Two questions were raised with reference to which it was determined there should be an expression of the views of the committee as an aid in the interpretation of the rules in question.

"The other question was raised by Messrs. Padway and Vincent orally at the hearing. Rule 65(e) provides in part as follows:

"These rules do not modify the act of October 15, 1914, chapter 323, sections 1 and 20 (38 Stat. 730), United States Code, title 29, sections 52 and 53, or the act of March 23, 1932, chapter 90 (47 Stat. 70), United States Code, title 29, chapter 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee."

"The apprehension here was that the phrase 'relating to temporary restraining orders and preliminary injunctions;' might be construed as preserving from change only the provisions of the enumerated acts dealing with temporary restraining orders and preliminary injunctions.

"The Committee on the Judiciary suggested that the quoted phraseology in these two rules be considered at a conference between the representatives of the three mentioned labor organizations and of the Supreme Court advisory committee, so that any source of possible difficulty arising from the language used might be avoided. This suggestion was assented to. The conference was held and it was agreed that all doubts as to the meaning of the language used, raised

by the representatives of the labor organizations, would be removed by adding to the notes to rule 4(d) (3) and rule 65(e) of the notes to the rules of civil procedure prepared under the direction of the advisory committee, the following:

"To the note to rule 65(e):

"The words 'relating to temporary restraining orders and preliminary injunctions in action affecting employer and employee' are words of description and not of limitation."

"The Committee on the Judiciary has considered the additional notes and believe that they state the correct interpretation and construction of the respective rules." (Report of Committee on the Judiciary on Rules of Civil Procedure for the District Courts of the United States, Appendix to Congressional Record, 75th Congress, 3rd Session, Vol. 83, Part 11, p. 2920.)

See also statement of Robert G. Dodge, member of the Supreme Court Advisory Committee, Proceedings of the Institute on the Federal Rules of Civil Procedure, American Bar Association, Cleveland, 1938, pages 336-337 (The Lord Baltimore Press); Moore's Federal Practice (1955) Vol. 7, pp. 1617-18, 1676; and Barron & Holtzoff, Federal Practice & Procedure (1958) sec. 1438.

The foregoing analysis is further supported by the scrupulous care taken by this Court to comply with the enabling statute under which the rules were promulgated. This statute authorizes the Supreme Court to promulgate the Federal Rules but in express terms states "such rules shall not abridge, enlarge, or modify any substantive right." \* \* \* (Section 2072, Judicial Code, 28 U. S. C. A. 2072.) This limitation was observed by the Court as shown above by Rule 65 (e); but in addition Rule 82, applicable to all the Rules states in unqualified fashion that the Federal Rules of Civil Procedure "shall not be construed to extend or limit jurisdiction of the United States District

Courts \* \* \* Rule 82 has been interpreted by the courts carefully to exclude any enlargement of their jurisdiction.

The notion that the jurisdictional prohibition of the Norris-LaGuardia Act can be circumvented by reliance on Rule 62(c) is totally unfounded, and would lead to the most absurd results. The same argument which would support the use of Rule 62(c) as the basis for an injunction pending appeal in this case would equally justify the district court, after denying any relief whatever in an action unquestionably within the prohibition of the Norris-LaGuardia Act, in entering an injunction against the exercise of the right to strike for the protracted and indefinite period required for appeal.

It is thus clear beyond the shadow of a doubt that the right to issue injunctions pending appeal given under Rule 62 (c) was never intended to include the grant of authority withdrawn by Congress in the Norris-LaGuardia Act.

## VII.

### **THE RAILWAY LABOR ACT DOES NOT WITHDRAW THE RIGHT TO STRIKE FOLLOWING TERMINATION OF EMERGENCY SERVICES OF THE NATIONAL MEDIATION BOARD WHEN THE PROCESSES OF THE ACT HAVE BEEN EXHAUSTED.**

After the breakdown of the mediation processes because of the Railroad's refusal to enter into negotiations on the § 6 Notice, the Union took no strike action until after thirty days had elapsed following the termination of the services of the National Mediation Board on June 16, 1958. The trial court, however, held that after the Mediation Board had again tendered its services with equal lack of success for the same reason, the petitioners were required to refrain from striking for a second thirty-day period and entered an order enjoining the strike until

September 19, 1958. (R. 359.) The interpretation thus placed upon the Railway Labor Act is unique. It is an interpretation without precedent. It runs counter to custom and tradition in the handling of disputes in the railroad industry and the practical interpretation placed upon the Act by the National Mediation Board. It is unsupported by the language of the Act and would in fact frustrate one of the principal purposes of the Act, the settlement of disputes on an emergency basis.

#### A. The First Thirty Day Period.

While there has been no definitive decision of the courts on the extent of the right to strike afforded by the collective bargaining guarantee of the Railway Labor Act, this Court has given the clearest judicial expression to the relation between the statutory scheme and the use of economic power by strike and other methods in *General Committee, etc. v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 223 at 330, 332-333 (1943).\*

The fact is that there is no basis for requiring a union to abstain from striking during the thirty days following the initial mediation effort. The Railway Labor Act is devoid of any limitation on the right to strike except after

\* *Brotherhood of Railway and Steamship Clerks, etc. v. Railroad Retirement Board*, 239 F. 2d 37, 44 (D. C. Cir. 1956) does discuss the issue but is limited to a holding that the court would not disturb a decision of the Railroad Retirement Board that for the purposes of the Railroad Unemployment Insurance Act a strike under the circumstances there involved violated the Railway Labor Act.

In the only case decided by this Court involving a strike commenced within thirty days after termination of mediatory services, no argument was made based on this fact. The Court held that it was without jurisdiction to enjoin the strike, *B. R. T. v. Toledo, Peoria & W. R.*, 321 U. S. 50 (1944). In *Butte, Anaconda & P. R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 268 F. 2d 54 (C. A. 9, 1959), cert. denied . . . . U. S. . . . . (October 19, 1959), an injunction was refused even though the strike occurred before the mediation process was completed.

the appointment of an Emergency Board under Section 10 and hence there was no limitation on the right to strike after the termination of the services of the National Mediation Board.

Section 10 does restrict the right to strike, at least as that section has been interpreted. It provides that if the President should appoint an Emergency Board to investigate and report concerning a dispute, "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made *by the parties to the controversy* in the conditions out of which the dispute arose." This provision obviously is directed to both parties to the dispute, and prohibits either of them from making changes "in the conditions out of which the dispute arose." (Emphasis supplied.)

In marked contrast is the language in Section 5, First and Section 6. Section 6 provides that for specified periods (depending on various contingencies) after either side has served the other with a proposed change in the collective bargaining agreement, "rates of pay, rules, or working conditions shall not be altered *by the carrier* until . . ." (Emphasis supplied.) Obviously, unlike Section 10, this provision instead of being directed to "*the parties to the controversy*" is directed to the "carrier," and it would require an extremely tortuous construction to find this language restricting the conduct of "*the parties to the controversy*."

Section 5, First is similar to Section 6 and also is in marked contrast to Section 10. Section 5, First provides that after the termination of mediation and for 30 days thereafter, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." Obviously, that provision is directed to those who can make a change in

rates of pay, rules, working conditions, or practices, and only the carrier can make such change. This is buttressed by the prohibition in this provision of any change in "rates of pay, rules, or working conditions", as contrasted to the Section 10 prohibition of any change "in the conditions out of which the dispute arose."

The foregoing analysis of the language of the Act is corroborated by the legislative history of the purpose of Section 5, First. The 1926 Act contained no provision in Section 5 for a waiting period following the termination of mediation. During the congressional hearings the proponent of the 1934 revision of the Act explained why the 30 day waiting period was placed in Section 5:

"I call your especial attention, however, to a change which appears in the first paragraph of section 5. This provides that the Mediation Board, in the event that its mediatory efforts fail, shall notify both parties in writing to this effect, the prevailing rates of pay, rules and working conditions, however, to remain in status quo for 30 days thereafter. As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 60 days.

*"It is provided, you will recall, that when the President appoints a fact-finding board both parties must remain in status quo for 60 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike vote prior to the termination of mediation. This is obviously a very unsatisfactory expedient, but it does enable the Board of Mediation to certify to the President that an interruption to interstate commerce threatens, thus enabling him in turn to issue an Executive order before the railroad can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several in-*

*stances. The change now proposed is designed to plug this hole."* (Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess., p. 21; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess., p. 50.). (Emphasis supplied.)

It is doubly plain, therefore, both from the distinct difference between the language of Section 5, First and Section 10 and from the legislative history of the former section, that Section 5, First was intended as a restriction on the carriers, making changes in rates of pay, rules, and working conditions, and was not intended as a restriction on the employees' right to strike, which is restricted only by Section 10.

Apart from the specific legislative history with reference to the three sections of the Act referred to, the hearings on the bill that became the Railway Labor Act of 1926 and statements in House debates by proponents of the bill establish plainly that that Act was not intended to prohibit strikes except to the extent that they were prohibited during the 60 day period after the creation of an emergency board.

The National Mediation Board, charged with the duty of administering the Act, has made the following statement:

"There is nothing in the procedures of the Railway Labor Act which compels the parties to reach agreement. Rather, the law is based on the theory that the parties should reach an agreement of their own accord. *The law does not deny the employees the right to strike.* The right, however, is subject to the obliga-

\* See the opening statement by Congressman Barkley, the sponsor of the bill in the House, 67 Cong. Rec. 4513, 4517. See also 67 Cong. Rec. 4702-4703, 4705-4723.

tions to enter into negotiations during which the nature of the dispute can be fully explored and the issues presented, if necessary, to disinterested persons for solution."\* (Emphasis supplied.)

### B. The Second Thirty Day Period.

In view of the absence of a limitation on the right to strike in the Railway Labor Act, other than that contained in Section 10, the District Court's holding that a strike may not be commenced during a new or second thirty day waiting period is completely without support in the law.

Assuming for the purpose of argument that there is a limitation upon the right to strike during the thirty-day period provided in Section 5, First, of the Railway Labor Act, there is nothing in that section or in any other provision of the Railway Labor Act to support the Court's ruling that where the regular mediatory services of the Board have been exhausted and the parties have waited the thirty-day period, involved that they must again wait an additional period of thirty days because emergency services are tendered.

The point which requires emphasis is that the Act visualizes a process whereby the Board will (1) use its best efforts, by mediation, to bring the parties to agreement, and, that failing, will (2) endeavor to induce the parties to submit their controversy to arbitration. This is all. The endeavor to induce the parties to submit to arbitration is "the *final* required action" of the Board. Congress did not require the Board, once it had used its *best efforts* to mediate and then to induce arbitration, and had failed, to "try, try again." How many successive efforts, each resulting in failure and each followed by a thirty-day period, is it possible to contemplate? We do not sug-

\* Twenty-first Annual Report of the National Mediation Board (1955), p. 4.

gest that, its regular procedure for mediation having failed, the Board was precluded from trying again, on its own motion, to bring about a settlement. Its intervention at any time may be important in the public interest, and should be encouraged, as it is encouraged by the Act. But we do suggest that *only one* effort, conforming to the required procedures and followed by the prescribed thirty-day period, is contemplated by the Act, and that this is true whether the services of the Board are invoked by the parties, or are proffered by the Board on its own motion, or both. Once the Board has failed by the use of its best efforts to bring the parties to agreement by mediation, it has one duty and one only: to endeavor to persuade the parties to submit to arbitration. That is the Board's "final required action".

It is clear from the emergency clause of Section 5, First, that it was intended solely to permit the Board in its discretion to step into an emergency situation just as it did in the instant case and try to settle it. Thus, when the National Mediation Board tendered its services on August 18, 1958, it opened a new file on its emergency docket, No. E-175.\*

Under the emergency clause the National Mediation Board has developed the salutary practice of voluntarily stepping into disputes on the eve of a strike to endeavor to bring about settlement, even where previous effort pursuant to its required function under this section has failed. This may include attempts to settle work stoppages, or strikes over grievance matters referable to the National

\* When the Board proffers its services under the emergency clause of Section 5 of the Railway Labor Act, it assigns such cases to a separate "E" number docket which is separate and distinct from its usual "A" number docket assigned mediation cases. See Twenty-third Annual Report of the National Mediation Board (1957), pp. 11, 16.

Railroad Adjustment Board clearly outside the two classes of disputes it is required to act on.

How this is done is left entirely up to the Board. In contrast to the required procedures above outlined, it is not required to request the parties to submit to arbitration. The Board is given complete freedom to act. Its emergency activity has proved to be valuable in avoiding strikes. In most situations the parties welcome its intervention, because neither loses anything thereby, and a settlement, if achieved, benefits both. The construction placed on the Act by the trial court not only is unsupported by the language of the Act but would make impossible the successful exercise of the mediatory function at the most crucial point of the dispute.

In many labor disputes settlements are reached on the very eve of a strike. It is at this point that the incentive to settle is strongest. Faced with the serious consequences of a strike, both sides make their maximum concessions.

If a thirty-day waiting period were to result automatically from the emergency intervention of the National Mediation Board, the practical effect in most cases would be to delay settlement for thirty days. Rather than be responsible for a delay in settlement, the National Mediation Board would feel compelled to refrain from tendering its emergency mediatory services.

In sum, the construction placed upon the Railway Labor Act by the trial court and implicitly affirmed by the Court of Appeals is unsupported by the Act and would frustrate its basic purpose of encouraging peaceful settlement of disputes.

**CONCLUSION.**

For the reasons heretofore set out, petitioners respectfully request that this Court reverse the judgment of the Court of Appeals for the Seventh Circuit and remand this case to that court with directions to vacate all injunctive orders entered in this case, dismiss the complaint and order the District Court to assess damages under the bonds posted.

Respectfully submitted,

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Dated November 25, 1959.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

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No. 100.

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THE ORDER OF RAILROAD TELEGRAPHERS,

A VOLUNTARY ASSOCIATION, ET AL.,

*Petitioners,*

*vs.*

CHICAGO AND NORTH WESTERN RAILWAY

COMPANY, A CORPORATION,

*Respondent.*

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## APPENDIX TO PETITIONERS' BRIEF ON THE MERITS.

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*Introductory:* The Court of Appeals' misinterpretation of the Railway Labor Act is in effect an amendment of that Act. It is an interpretation based on a policy determination which properly is for Congress to make and not the Courts. We deal with the policy issues in this way solely because they are the fulcrum of the Court of Appeals' decision.

The quest for employment security has been the central economic problem of the nation for the last thirty years. Efforts to solve this problem within the framework of our existing institutions have been carried forth on many fronts and have involved the pragmatic de-

velopment of both public and private programs. In this respect, collective bargaining has been the traditional device by which the American worker has sought to achieve an adequate degree of job security. Through joint consultation between employee representatives and management, it has been possible to establish programs for employment stabilization which reflect the unique circumstances of each situation and thus serve the special needs of the parties at interest. By dismissing the Union's proposal for job security in the present case as "an attempt to usurp legitimate managerial prerogatives" the Court of Appeals for the Seventh Circuit has, in fact, ignored the mass of industrial relations practices in industry in general and the railroad industry in particular. Such an arbitrary and eclectic application of "management prerogatives" to deny the bargainability of the Union's contract proposal stands in conflict with hard assessments of contemporary economic reality and can only reduce collective bargaining to a procedural device for inconsequential debate.

Moreover, it is apparent that if the doctrine of the Court of Appeals were to survive it would substantially impair the efficacy of the collective bargaining process. When confronted with a union proposal which it found distasteful for any reason, management would be encouraged to assert capriciously the non-bargainability of the proposal. Any subsequent attempt by the union to exercise its economic strength would then be immediately met with injunctive litigation which might defer settlement of the issue for years, as in the instant case. A survey of recent collective bargaining developments in the railroad industry clearly indicates that the carriers are prepared to exploit the tactical advantages inherent in the ruling of the Court of Appeals by presumptuous declarations of the non-bargainability of conventional union proposals.\* Such an

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\* See table following Conclusion.

approach may serve the interests of management, but it cannot be reconciled with the endorsement of free collective bargaining by the Railway Labor Act as it has evolved in the United States.

## I.

### **LABOR, MANAGEMENT AND EXPERT OPINION IS UNANIMOUS IN AGREEING THAT JOB SECURITY AND EMPLOYMENT STABILIZATION CONSTITUTE VITAL ASPECTS OF WORKING CONDITIONS.**

A ready consensus exists concerning the paramount importance of job security to the American worker. The historical significance of job security as an issue—and a goal—in modern industrial relations was underscored by the Latimer Report, a compendious study of wage and employment guarantees which was carried out at the request of the late President Roosevelt. In viewing the post-World War II scene the Report stated that:

“The recent emergence of demands by organized labor for wage guarantees from employers has been correctly appraised as a trend of great significance, for these demands reflect a basic and urgent drive for security on the part of great groups of workers. But it would be incorrect to think of this drive as either new or unique; it is in the main stream of the American Labor Movement. That movement has been expressed in many ways and its immediate objectives have taken many forms. One objective of the labor movement has always been higher real wages; another has always been security.” (Office of War Mobilization and Reconversion, Office of Temporary Controls, *Guaranteed Wages: Report to the President by the Advisory Board*, 1947, p. 1.)

Similarly, academic experts in the field of union-management relations have long recognized the preeminence of job security and employment stabilization as formal union

objectives. Indeed, the attainment of these objectives may be specified as the *raison d'être* of organized labor. Thus, Professor Lloyd G. Reynolds of Yale University has noted:

"Workers are continually faced with a scarcity of available jobs, and consciousness of this scarcity molds union philosophy and tactics. The union is a method of distributing these opportunities among union members according to some equitable principle." (Lloyd G. Reynolds, *Labor Economics and Labor Relations*, New York, 1954, p. 236.)

Management representatives have also revealed an awareness of continued worker concern over the problem of job security. In an analysis of alternative programs for employment stabilization within individual companies the National Association of Manufacturers placed job security at the top of the list of employee aspirations. The N. A. M. said:

"The foremost desire of American workers is for job security. The tragic depression years are remembered and feared. Predictions of general unemployment and economic catastrophe have intensified the feeling of insecurity which plagues many employees.

"Regardless of the validity of such fears, if employers do nothing to reassure their employees, labor-management relations may be worsened and productive efficiency reduced, whereas increased efficiency is needed . . . ." (National Association of Manufacturers, Industrial Relations Division, *Employment Stabilization*, 1952, p. 6.)

The emphasis placed on job security by labor spokesmen is so well known that it scarcely requires documentation.

The concurrence of labor, management and expert opinion that employment security is a matter of vital private and public concern obviously contributed to the passage of the Employment Act of 1946 by the United States Congress. By this statute, Congress declared it to be:

" . . . the continuing policy and responsibility of

the Federal government \* \* \* to promote maximum employment, production and purchasing power." (Public Law 304, 79th Congress, 2nd Session, An Act to Declare a National Policy on Employment, Production, and Purchasing Power, and for other Purposes.)

It is clear, then, that the Court of Appeals would exclude from collective bargaining a subject of such importance that it has evoked statements of common concern from all the interested parties and the federal government. Where the affected employees have chosen to be represented by a union, the problem of employment security cannot be subsumed in anachronistic notions of management prerogatives. Instead, collective bargaining becomes the appropriate device for grass roots determination of mutually acceptable remedial programs.

## II.

### **THE PERSISTENCE AND VARIABILITY OF THE EMPLOYMENT STABILIZATION ISSUE IN COLLECTIVE BARGAINING REFLECT THE DIVERSE CAUSES OF INSTABILITY OF EMPLOYMENT.**

In the years since the passage of the Employment Act of 1946, the United States has enjoyed relatively full employment. Nevertheless, the problem of employment security has endured for both individual employees and large groups of workers. The persistence of this problem during periods of high level employment serves to dramatize the fact that instability of employment is a consequence of diverse causes which are rooted in the complexities of modern industrial society and the process of economic growth. For this reason, efforts to achieve job security and employment stabilization through collective bargaining cannot be analyzed or understood *in vacuo*. As a preliminary step, it is necessary to describe briefly those

categories of factors which, historically, have given rise to insecurity of employment.

First, *secular economic forces* have been a source of instability of employment. These secular forces comprehend the development of new products, changes in consumer tastes, shifts in the geographical distribution of population and industry, and advances in technology. As such, they constitute the data of economic growth. That these secular developments have had an unstabilizing effect on the employment of large groups of workers is beyond dispute. The widespread use of oil as a source of heat and energy has contributed to the chronic unemployment of a sizable number of the nation's coal miners. (Causes of Unemployment in Coal Mining and Other Domestic Industries, Hearings Before the Subcommittee to Investigate Unemployment of the Committee on Labor and Public Welfare, U. S. Senate, Eighty-Fourth Congress, First Session, pp. 185-187, 291-294.) The increased consumer acceptance of synthetic fibers has accelerated the decline of the traditional cotton and woolen goods manufacturing centers in New England with the resultant displacement of major segments of the textile labor force. (Cf. Problems of the Domestic Textile Industry, Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Congress, Second Session.) And pervasive changes in technology, encompassed by the term "automation" have reduced employment and rendered established skills obsolete in many industries such as automobiles, steel and chemicals. (Automation and Technological Change, Hearings before the Subcommittee on Economic Stabilization of the Joint Committee on the Economic Report, Congress of the United States, 84th Congress, First Session.) It is apparent that despite the maintenance of high levels of aggregate employment in the economy, the *structural* changes in the

labor force associated with secular factors have inevitably introduced powerful elements of job insecurity to given groups of workers.

This does not mean that organized labor in the United States has sought, or will seek, to retard economic growth in the name of employment stability. To the contrary, the trade union movement has accepted the necessity for economic change and has given its primary attention to the task of smoothing the adjustment and equitably distributing the social costs of such change among the affected parties. Within this context, collective bargaining has met its severest test. Organized labor's approach to secular forces, like technological change, was succinctly stated by George Meany, President of the AFL-CIO. Meany said:

"Certainly the trade union movement does not oppose technological change. There can be no turning back to a negative or shortsighted policy of limiting progress. \* \* \* The answer to technological change lies in smoothing its transitions and cushioning the shocks that attend it. This means, in the immediate sense, the establishment of severance pay, retraining of skills, reorganization of work schedules. These are social costs that industry will have to bear in order to avoid the wasting of human resources—and to avoid our calling on government to bear these costs if industry fails to do so." ("What Labor Means By More," *Fortune Magazine*, March, 1955.)

Second, *cyclical fluctuations* in aggregate economic activity constitute a periodic threat to the job security of the individual workers. Because the pace and level of economic activity cannot be rigidly controlled in a democratic society, the United States has been confronted with recurrent periods of recession and depression. Recent advances in economic theory have led to the implementation of fiscal and monetary policies which have reduced the amplitude

of these cyclical fluctuations. However, the post-World War II record clearly reveals that changes in the level of economic activity over the course of the business cycle still create major problems of instability of employment. On three occasions, in 1948-1949, 1953-1954, and 1957-1958, the nation was subjected to periods of recession when unemployment once again became a matter of acute public concern. In 1958, unemployment in the United States reached a post-war high, exceeding 7% of the civilian labor force. The severity and duration of this contraction ultimately generated pressure for additional, temporary unemployment benefits under an emergency federal program. (Temporary Unemployment Compensation, Hearings Before the Committee on Finance, United States Senate, 85th Congress, Second Session; Temporary Unemployment Compensation Act of 1958, Pub. L. 86-7, Mar. 31, 1959, 73 Stat. 14).

Although it is obvious that organized labor cannot independently remove the causes of cyclical fluctuations, it is equally apparent that trade unions can direct their efforts to the formulation of programs and policies through collective bargaining which will lessen the impact of these fluctuations on their members. In this respect, to negotiate over employment stabilization is to focus on a perennial problem of employees and employers alike.

Third, *seasonal* factors contribute to instability of employment in many specific industry situations. In these cases, seasonality of the demand for product of the particular industry, or in the supply of a raw material necessary to the manufacture of the product, is reflected in the level of employment in the industry. Thus, employment in the women's garment industry is geared to the Spring and Fall fashion seasons. Similarly, automobile industry employment varies at different stages of the "model year". On the other hand, seasonal instability of employment in

the meat-packing industry may be traced to the seasonality of the movement of livestock to market.

Because these seasonal factors are unique characteristics of given industries, job insecurity arising from this source has proven to be particularly amenable to remedial programs established by collective bargaining. A long recognized virtue of collective bargaining is its flexibility and capacity for affording mutually acceptable solutions tailored to the specific problems at issue.

Fourth, *managerial factors* give rise to insecurity of job tenure. By managerial factors is meant those factors which derive from the exercise of managerial discretion in a specific employee-employer relationship. For example, instability of employment has been a consequence of the unwillingness, or failure of management to develop stable production schedules over a prescribed period of time even when the aggregate level of production within this period would permit a relatively invariable distribution of employment opportunities. In other situations, job insecurities have been created by managerial decisions to contract-out work that was formerly performed by employees in the plant or shop. And most obviously, the arbitrary exercise of management's authority to discharge individual employees has been a continuing source of instability for the individual worker whose economic livelihood depends upon his ability to retain gainful employment. It is these "managerial prerogatives" which have been the subject of joint determination as a matter of course in any vigorous collective bargaining relationship.

The paramount importance of employment stabilization and job security as a collective bargaining issue in the railroad industry follows from the fact that each of the broad categories of unstabilizing factors enumerated above have had a heavy impact on railroad employment over a period of time. Secular factors like the emergence of air

and motor transportation systems have posed a powerful threat to the maintenance of railroad employment. In addition, the railroad industry has been subjected to pervasive technological changes which have reached almost every aspect of the total employment situation. Major innovations, such as the substitution of diesel for steam locomotives, have paved the way for large increases in productivity and commensurate adjustments in the size and occupational distribution of the railroad work force. (Hearings before the Subcommittee on Surface Transportation, Committee on Interstate and Foreign Commerce, U. S. Senate; 85th Congress, Second Session, Part 4, pp. 2056-2078, 2147-2153; also Harold Barger, *The Transportation Industries, 1889-1946: A Study of Output, Employment and Productivity*, National Bureau of Economic Research, 1951, pp. 93-111.)

At the same time, the accretion of minor technological changes has also injected elements of instability of employment into the railroad labor situation. The cumulative effect of small technological changes on railroad employment, particularly in the maintenance area, has been attested to in a careful study of the transportation industry conducted by the National Bureau of Economic Research:

"Rather striking improvements have been made in the maintenance of track and fixed equipment. The burden placed upon those concerned with permanent way has of course increased through heavier and faster trains: These have necessitated heavier rail, strengthened bridges and relocated tracks. However, the reduction of grades and elimination of curves involved in the relocation of track have made for operating economies, while the installation of automatic crossing signals and the elimination of grade crossings have reduced the need for watchmen. As recently as the early 1920's less than half of all replacement ties were chemically treated; treated ties, which may last twice as long as untreated now comprise more than four-

fifths of all ties made. The use of longer rails and heat treatment of rail ends to withstand battering also decreases the need for maintenance. Finally, in the actual operations of relaying track, a high degree of mechanization has been achieved." (Barger, *supra*, p. 108.)

Beyond these advances in mechanical technology, widespread organizational adjustments have taken place. In the railroad industry, such organizational changes have generally taken the form of consolidation of facilities. The relationship between conventional notions of technological change and the consolidation of railroad facilities was clearly drawn by a report of the Board of Investigation and Research established under the authority of the Transportation Act of 1940. The report declared:

"\* \* \* Railroad consolidation may be regarded as a form of labor-saving improvement—an organizational form of technological advance which raises essentially the same problems with regard to labor as does the progress of technology in the narrower sense. From this point of view, changes in the operating methods of a single carrier are just as much a part of the problem as are co-operative undertakings by two or more carriers." (Railroad Consolidation and Employee Welfare, U. S. Senate Document No. 17, 79th Congress, First Session, p. 2.)

At the present time, the railroad employers including North Western are in the process of pressing proposals which deal with the alleged need for the reduction of engine crew sizes on the unions. (Section 6 Notice Submitted by Carriers' Conference to Brotherhood of Locomotive Firemen and Enginemen, *et al.*, dated November 2, 1959; Demand Concerning Use of Firemen (Helpers) on Other Than Steam Power.) This proposal, first made in 1956, grows out of the technological change associated with the substitution of diesel for steam power. However, when con-

fronted by a union proposal to cope with the dislocations accompanying broad technological changes which are organizational in nature, the North Western retreats behind a defense of "management prerogatives", and the Court of Appeals lends its affirmation to this action. That broadly conceived, jointly determined measures are necessary to cope with the dislocations attending the consolidation of facilities is revealed by an assessment of the human and social consequences of such innovations.

The extraordinary impact of the consolidation and resultant abandonment of railroad facilities on the worker and the community has been vividly documented. A sociological study details the human and economic costs incurred when dieselization led a railroad to close down a service and maintenance center in a small town. The individual worker was confronted with the loss of employment and the obsolescence of specialized skills acquired through long years of experience. Local merchants were forced out of business or continued to operate at a bare margin of profitability. Homeowners saw their equities disappear as property values fell precipitately. The entire community entered a stage of demoralization with little prospect of revival. (W. F. Cottrell; "Death By Dieselization: A Case Study in the Reaction to Technological Change," *American Sociological Review*, June 1951, pp. 360-361.)

The stability of employment of railroad workers has also been adversely affected by cyclical fluctuations in the level of national economic activity. A careful study of railroad employment trends has revealed that the railroad worker enjoys no special immunities from the hazards of the business cycle. Over a thirty year period, railroad employment more or less fluctuated to the same degree as employment in manufacturing in general. (Maurice Parmlee, *Economic Factors Influencing Railroad Employment*, United States

Railroad Retirement Board, 1946, p. 143.) Moreover, certain groups of railroad employees have been more susceptible to cyclical instability of employment than others. Since 1946, cyclical changes in maintenance of way employment, for example, have been two or three times greater than for total United States employment and about 50 per cent greater than for all other railroad employment. (William Haber *et al.*, *Maintenance of Way Employment on U. S. Railroads*, Brotherhood of Maintenance of Way Employees, 1957, p. 65. Professor Haber conducted this independent study at the request of the Brotherhood.)

These cyclical instabilities of railroad employment have often been magnified by seasonal factors. In one situation, seasonal instability of employment was so acute that the shopcraft workers employed by the Seaboard Airline Railroad pressed for a substantial wage increase in order to bring annual earnings up to an acceptable level. As will be shown subsequently, these negotiations led to the formulation of the notable guaranteed employment plan covering the shopcraft workers of that railroad. (John L. Afros, "Guaranteed Employment Plan of Seaboard Railroad," U. S. Bureau of Labor Statistics, *Monthly Labor Review*, pp. 167-171.) Again, it may be noted that the seasonal sources of job insecurity may be greater for some groups of workers than others. In this respect, it may be pointed out that maintenance-of-way employment fluctuates by approximately 20 per cent between February and July of any given year. (Haber, *supra*, p. 99.)

The effect of managerial factors on job insecurity in the railroad industry cannot be sharply distinguished from their effect in other industries. Railroad management cannot be viewed as more or less arbitrary than other managements in invoking its authority to dismiss individual workers. Nonetheless, certain managerial factors have

created special problems of insecurity of railroad employment. For example, the managerial practice of assigning monthly budgets for maintenance work has given rise to employment instability for shop and way maintenance workers beyond the insecurities deriving from secular, cyclical and seasonal factors. (Afros, *supra*, and Haber, *supra*, pp. 195-197.) Also, railroad management has increasingly resorted to the contracting-out of work formerly performed by its own employees. Superimposed upon these managerial factors is the observation that many of the occupational skills indigenous to railroad employment, such as fireman, engineer and telegrapher, are not readily transferable to other industrial situations in the event of displacement.

When confronted with these multiple sources of instability of employment, trade unions do not automatically turn to a single measure to ameliorate the plight of their members. The programs espoused by trade unions to promote stabilization of employment will, in each case, depend upon the factors which generate the instability, the magnitude and severity of the instability, and the peculiar traditions which have marked the evaluation of union-management relations over time. The Court of Appeals has commented that, " . . . stabilization of employment is a broad term, . . . " and thus cannot be used as a blanket justification for infringements on so-called management prerogatives. The Court of Appeals failed to understand the fact that the breadth of the term "stabilization of employment" lies not in the looseness of rhetorical usage, but in the breadth and complexity of those factors which give rise to instability of employment in the first instance.

In practice, stabilization of employment has been a basic warp on which the whole fabric of collective bargaining has been woven. Thus trade unions have developed several

alternative approaches to the problem of providing their members with stability of employment:

First, trade unions have sought explicit recognition by the employer, of the propriety of joint union-management consultations in dealing with the problem of job security and stabilization of employment. This approach establishes the procedural mechanisms by which substantive remedies may be formulated and implemented by both parties.

Second, trade unions have attempted to fix their members' right to specified types of work by the negotiation of clauses which define the bargaining unit, prohibit management from contracting out work, limit the activities of supervisory employees, or spell out the occupational classifications covered by the agreement.

Third, trade unions have aimed at controlling the distribution of available employment opportunity among their members by pressing for shorter hours, provisions concerning the allocation of overtime, and the use of objective criteria, like seniority in determining who shall be laid off.

Fourth, trade unions have developed programs, such as supplemental unemployment benefits and dismissal compensation, which penalize employers for instability of employment and therefore act as a deterrent to layoffs.

And fifth, trade unions have sought to maintain a given level of employment opportunities by bargaining over work crew requirements and the terms of specific employment guarantees on a monthly or annual basis.

The particular approach, or approaches, utilized by a trade union will vary from case to case. Trade union efforts to promote stabilization of employment, like those of the federal government, must be adapted to the circumstances of each situation. Seniority may protect the individual worker from the arbitrary exercise of management's

authority to lay off, but it is an ineffectual stabilizing device, by itself, in coping with major cyclical displacements. Supplemental unemployment benefits may deter layoffs during the downward course of the business cycle, but such programs are not adequate to the task of meeting the challenge of powerful secular factors which have called forth the Telegraphers' contract proposal in this instance. The Court of Appeals has noted with approval that North Western's management has demonstrated a willingness to bargain over supplemental unemployment benefits and related matters. In other words, it has affirmed the bargainability of programs designed to deal with instability of employment which arises from one set of economic factors, i.e., the business cycle, but has erected a wall of "management prerogatives" around alternate approaches to stabilization of employment which are aimed at the consequences of other causal factors. Such a distinction denies the viability and strength of collective bargaining.

### III.

**ANALYSIS OF COLLECTIVE BARGAINING PRACTICE IN INDUSTRY IN GENERAL AND THE RAILROAD INDUSTRY IN PARTICULAR REVEALS THAT THE PRINCIPLE OF JOINT DETERMINATION FOR DEALING WITH PROBLEMS OF STABILIZATION OF EMPLOYMENT HAS GAINED WIDESPREAD ACCEPTANCE BY MANAGEMENT.**

Numerous collective bargaining agreements, entered into by some of the leaders of American industry, have endorsed the principle of joint union-management determination of solutions for dealing with the problem of achieving job security and stabilization of employment. In this respect, the present contract between the General Electric Company and the International Union of Electrical Work-

ers contains the following clause which not only provides for joint consultation on the issue of employment security but which also specifically reserves to the union the right to strike in the event that no agreement results from the negotiations between the parties. The contract declares that:

"Notwithstanding any other provisions of this Agreement, upon written notice from the Union to the Company not more than 30 days prior to September 1, 1958, collective bargaining negotiations shall commence between the parties on September 1, 1958, for the purpose of considering proposals for contracting with regard to *any questions directly relating to employment security* which may be submitted by either the Union or the Company. If no agreement is reached thereon by October 1, 1958, the Union and its Locals shall have the right to strike over such proposals but the contract shall continue in effect as provided." (Contract expires 9/60.) (Bureau of National Affairs, Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts, Vol. 2, 53: 305, emphasis supplied.)

The recent agreement negotiated by Armour and Company and the two packing house workers' unions further demonstrates the possible breadth of joint consultations devoted to the development of policies which promote employment security. Realizing that momentous changes in technology had generated extreme insecurities for its work force which could not be reached by conventional measures, such as severance pay, Armour did not reject union requests to bargain over stabilization of employment by falling back on arbitrary declarations of management prerogatives. Instead, the company "recognized that these problems require continued study to promote employment opportunities for employees affected by the introduction of more efficient methods and technological change." Armour further agreed to formalize union-management

discussions on this issue by setting up a joint study committee whose activities were to be underwritten by a special "automation fund" financed by the company. Among other things, this committee will consider "any . . . methods that might be employed to promote continued employment opportunities for those affected. \* \* \*" (Exhibit A, Agreement between Armour and Company and United Packinghouse Workers of America and Amalgamated Meat Cutters and Butcher Workmen, effective September 1, 1959.)

Even in the current labor dispute in the steel industry, where the companies up to this time have taken a firm position on "management prerogatives" with respect to work rules, a consensus exists concerning the desirability of joint union-management consultations dealing with programs for stabilization of employment. During the course of negotiations in the steel controversy the employers proposed the establishment of a joint Human Relations Research Committee. Among other things the Committee would—

"\* \* \* plan and oversee studies and recommend solutions of mutual problems in the areas of . . . (G) Employment Stabilization and other problems arising from practice changes to improve efficiency of operations". (Appendix C, Report to the President on the Labor Dispute in the Steel Industry Submitted by the Board of Inquiry Under Executive Orders 10843 and 10848, October 19, 1959).

The willingness of the steel companies to give distinctive organizational form to joint consultations concerning stabilization of employment emphasizes the retrogressive character of North Western's stand on this issue.

In addition to these broad endorsements of the principle of joint consultation to effectuate employment security, specific procedures have been devised through collective

bargaining, which provide for mutual consent or extensive discussions between the union and management before employees within the bargaining unit can be laid off. Thus a recent contract between the International Association of Machinists and the Whiton Machine Company spelled out the following procedure:

"It is further agreed that the company will confer and agree with the Shop Committee before making promotions, permanent transfers, layoffs, separations and discharges for any reason." (BNA 60:11.)

The bargaining agreement between the Michigan Bell Telephone Co. Plant Department and The Communications Workers of America similarly required negotiations during the term of the contract in the event that established provisions governing layoffs were not adequate to meet new situations as they arose. The agreement stated:

"It is mutually agreed after such notification is given by the Company that if the part-time or lay-off procedures provided for in this article do not seem to meet the requirements of the particular situation existing at the time, an attempt will be made to negotiate the necessary amendments. . . ." (BNA 60:11.)

The salutary effects of such managerial willingness to adopt a flexible approach in dealing with the problems attending the displacement of employees has been attested to by a top executive of the Michigan Bell Telephone Company. (Harold Schroeder, Vice-President, Michigan Bell Telephone Company, "Employee and Community Relations Problems Resulting from Technological Development," *Michigan Business Review*, July, 1957). Other major companies, like the Ford Motor Company and the Aluminum Company of America, have also utilized bargaining procedures to handle special problems involved in carrying out layoffs. (BNA 60:12-13.)

In contravention to North Western's assertions, the rail-

road industry has not been insulated from the main stream of collective bargaining developments. Railroad employers, like industry employers, have long accepted the principle of bargaining with unions over the issue of stabilization of employment. In 1932, the twenty-one standard railroad unions, presented a plan for stabilization of employment to a carriers' committee representing major railroad employers in the nation. The unions' plan was designed to afford railroad employees some relief from the instability of employment caused by the depression and further establish a framework for the determination of a long term program of employment security. The unions' immediate proposal called for stabilization of employment by assuring one year of employment to a prescribed number of employees in each class.

During the course of subsequent negotiations on this proposal, the carriers' bargaining committee expressed its sympathetic consideration of the unions' goals, but refused to establish any concrete program for stabilization of employment at that time. Instead, the carriers' committee and the unions entered into a Memorandum of Agreement, effective February 1, 1932, which unequivocally confirmed the Railroad employers' continued willingness to bargain over stabilization of employment through negotiations between individual carriers and the unions which represented their respective employees. The Memorandum of Agreement declared:

"Item 1. It is agreed that whatever may be practicable should be done to remove the feeling of uncertainty as to employment which may exist at the present time in the minds of many who are now employed, either upon a whole time or part-time basis; and that varying conditions make it necessary to deal with this question by local negotiations on each railroad between each participating railroad and its employees, in the usual manner, through each participating organiza-

tion; and that accordingly, *the railroads will carry on negotiations for the purpose of stabilizing employment for such periods and to such an extent as conditions may justify; it being understood that this agreement does not contemplate assurance of pay for service not performed unless covered by present agreements.*" (Official Proceedings, Ninth Convention, Railway Employees' Department, American Federation of Labor, April 4-8, 1938, p. 10; emphasis supplied.)

Despite the failure to agree on a specific program for employment security during the 1932 negotiations, the explicit confirmation of the bargainability of the stabilization of employment issue paved the way for future developments in this area. These developments transpired in a climate of public policy which lent support to private measures to cope with the difficulties of employment stabilization.

In 1933, Congress passed the Emergency Railroad Transportation Act (Public Law No. 68, 73rd Congress) in order to encourage, promote or require action on the part of carriers subject to the Interstate Commerce Act which would avoid unnecessary duplication of services and facilities and other wasteful or inefficient practices. Section 7(b) was included in the Act to provide employment security for railroad employees who would otherwise be deleteriously affected by coordinations or unifications of facilities initiated under the authority granted by the statute. Section 7(b) specified that:

"The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the payrolls of the employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any

one year than five per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

While Section 7 (b) was designed to give railroad employees substantial protection against the insecurities created by consolidations, the impact of two factors made the provision less than fully effective. First, separations due to attrition could be deducted from the number of employees in service in May, 1933 at a rate of five per cent per year. In most instances of consolidation the number of employees of a single carrier who were affected was expected to be less than the number of deaths, normal retirements or resignations among all the employees of that carrier since the effective date of the statute. Second, Section 7 (b) did not apply to employees who were not on the payrolls in May, 1933, and thus did not provide protection to new employees. Consequently, Section 7 (b) covered a progressively smaller proportion of actual railroad workers. (*Employment Attrition in the Railroad Industry*, Federal Coordinator of Transportation, Section of Labor Relations, 1936, pp. 32-33.)

Dissatisfaction with this arrangement induced the railroad unions to press once again for a program for stabilization of employment through collective bargaining. The Federal Coordinator of Transportation, who occupied an office created by the Act of 1933, viewed this reliance on collective bargaining as "a wise course" and lent the government's research resources to the task of compiling "helpful" information for the parties to the negotiations. (Statement of Joseph B. Eastman, Federal Coordinator of Transportation, in *Employment Attrition in the Railroad Indus-*

try, *supra*, p. ii.) These discussions culminated in the ratification of the landmark Washington Job Protection Agreement of May, 1936. (Agreement of May, 1936, Washington, D. C., between certain Carriers and Twenty-One Organizations of Railroad Employees.) The Agreement covered the employees of over one hundred carriers and included a comprehensive program of procedures, rights and benefits which treat the various unstabilizing effects on employment of "coordinations" involving two or more carriers. The terms of the Washington Agreement have remained in effect to the present day and by 1956 coverage had been extended to include an additional ninety-four carriers. Moreover, the same general approach has been applied by individual carriers to displacements arising from consolidations within single railroad systems. (Cf. Memorandum of Agreement Between the Baltimore & Ohio Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective August 26, 1957.)

The approach to the problem of employment security which was embodied in the Washington Agreement received implicit government approval in Section 7 (f) of the Transportation Act of 1940 (Public Law No. 785, 76th Congress) which amended Section 5 of the Interstate Commerce Act. Section 7 (f) included both substantive protections for workers who were affected by consolidations and also affirmed the desirability of formulating additional remedial measures through collective bargaining. Section 7 (f) reads:

"(f) As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by a railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions pro-

viding that during the period of four years\* from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its employees."

In applying this section in specific cases, the Interstate Commerce Commission has avowedly patterned the conditions which it prescribes "to protect the interests of the railroad employees affected" after the provisions of the Washington Agreement. (Employee Protections Imposed by the Interstate Commerce Commission in the *New Orleans Union Passenger Terminal Case*, I. C. C. Financial Docket No. 15920, Decided January 16, 1952). Thus the Washington Agreement grew out of and was encouraged by public declarations which were favorable to the goal of stabilization of railroad employment. And since its ratification, the Agreement has enjoyed the approbation of the government agency charged with implementing national transportation policies.

Other more recent developments have confirmed railroad management's long acceptance of the bargainability of contract proposals concerning stabilization of employment. In the National Agreement of 1956, the carriers explicitly acknowledged the bargainability of stabilization of employ-

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\* The terms of the Washington Agreement specified a protected period of five years.

ment by excluding this issue from a general clause establishing a three-year moratorium on further demands by either management or the unions. Article VI of the National Agreement declared:

"The purpose of this Agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending notice to

"(a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement. \* \* \*

"(e) This Article VI does not prevent the progressing of pending notices, the serving of notices *and the negotiation of agreements dealing with stabilization of employment* or other matters not prohibited by the foregoing provisions of Article VI." (R. 268-9; emphasis supplied.)

The Chicago and North Western has also given contractual affirmation to the bargainability of employment stabilization by distinguishing this issue from the negotiation of a supplemental unemployment benefits plan covering non-operating employees represented by thirteen labor organizations. In effect, North Western has recognized that efforts to stabilize employment include, but also transcend, the establishment of a supplemental unemployment benefit plan which attempts to cope with insecurity of employment arising from only a narrow range of factors. The relevant portion of the SUB agreement asserts:

"The purpose of this Agreement is to alleviate undue hardship for the interim period, or until the Railroad Unemployment Insurance Act is revised or amended within that period. Therefore, this Agreement is not subject to change or modification during such three (3) year period, nor shall any labor organization or organizations parties hereto during such period serve or progress any notice covering changes in

this Agreement or dealing with stabilization of employment, separation of allowance or other similar requests or demands, unless such requests or demands are served by one or more of the organizations parties hereto on the railroads generally as part of a national or western regional movement in which event any national or western regional agreement reached may at the election of the organization or organizations parties hereto be substituted in its entirety for the protection hereby established in paragraphs 1(a)1 and 1(a)2 hereof. \* \* \* (Memorandum of Agreement Between Chicago and North Western Railway Company and Thirteen Labor Organizations effective May 6, 1956; emphasis supplied.)

North Western has refused to bargain with the Telegraphers over the latter's contract proposal for stabilization of employment, but in the above contract clause it apparently demonstrates its willingness to accept stabilization programs negotiated by *other* carriers as part of a national or regional movement. This inconsistency casts some doubts on North Western's sedulous concern for its "management prerogatives" in its dealings with the Telegraphers.

Beyond such specific recognition of the bargainability of stabilization of employment, one hundred and thirty-five (135) carriers, including North Western, have, in fact, agreed to joint consultation, with a railroad union, over matters arising during the term of the contract which might cause insecurity of employment. On May 22, 1957, the Brotherhood of Maintenance of Way Employees submitted a ten-point proposal to the railroads which aimed at stabilizing employment by regulating changes in track section limits, the use of maintenance-of-way machines, the contracting-out of maintenance of way and structures work and other causes of job insecurity of its membership. (Appendix to Employees' Formal Notice of May 22,

1957; Brotherhood of Maintenance of Way Employees.) The initial reaction of the carriers to this proposal was to question the bargainability of the union's requests. However, with the intervention of the National Mediation Board, as provided by the Railway Labor Act, negotiations over stabilization of employment were carried out and resulted in the following confirmation of the principle of joint consultation:

*"Article I—Prior Consultation.* In the event a carrier decides to effect a material change in work methods involving employees covered by the rules of the collective bargaining agreement of the organization party hereto, said carrier will notify the General Chairman thereof as far in advance of the effectuation of such change as is practicable and in any event not less than fifteen (15) days prior to such effectuation. If the General Chairman or his representative is available prior to the date set for the effectuation of the change, the representative of the carrier and the General Chairman or his representative shall meet for the purpose of discussing the manner in which and the extent to which employees represented by the organization may be affected by such change, the application of existing rules such as seniority rules, placement and displacement rules, and other pertinent rules, with a view to avoiding grievances arising out of the terms of the existing collective agreement and minimizing adverse effects upon the employees involved.

*"As soon as is convenient after the effective date of this agreement, and upon reasonable intervals thereafter, the carrier and the General Chairman or his representative will meet informally in a conference to discuss such suggestions as the General Chairman may have to minimize seasonal fluctuations in employment."* (Agreement Between Brotherhood of Maintenance of Way Employees and Carriers Represented by Eastern, Western and Southeastern Carriers' Conference, Entered into October 7, 1959, NMB Case No. A-5987.)

In the light of this record, it is clear that to sustain the position of the Court of Appeals that matters relating to stabilization of employment fall within the purview of management prerogatives would vitiate the force and social usefulness of collective bargaining as it has evolved in this country. The strength of collective bargaining lies not in rigid determinations of bargainability, but in being responsive to changing conditions as they arise in the economy and in individual firms.

#### IV.

#### **ANALYSIS OF COLLECTIVE BARGAINING AGREEMENTS IN INDUSTRY IN GENERAL AND THE RAILROAD INDUSTRY IN PARTICULAR REVEALS THAT JOB SECURITY AND EMPLOYMENT STABILIZATION HAVE, IN FACT, LONG BEEN OBJECTIVES OF SPECIFIC BARGAINING PRACTICES.**

The contractual recognition of the bargainability of employment stabilization analyzed above merely sets the stage for the implementation of specific measures which, in fact, are designed to stabilize employment for given groups of workers. Whether or not the contract contains such a declaratory statement of principle, the bargaining agreement will inevitably encompass numerous provisions which aim at mitigating or controlling instability of employment arising from diverse economic or managerial causes.

As indicated earlier, trade unions have sought to stabilize employment by establishing the right of their members to certain categories of work. A basic step in this direction is the definition of the extent of the bargaining unit with respect to the kinds of work or occupational classifications covered by the collective agreement. A typical clause staking out the extent of the bargaining unit reads as follows:

“For the purpose of collective bargaining with re-

spect to wages, hours and other conditions of employment, the Employers recognize the Union as the exclusive bargaining agent of all employees engaged in manual operations involved in the shipping, receiving, maintenance or in the mixing, preparing, manufacturing or handling of lead, color, oil, lacquer, aluminum, varnish and paint. \* \* \* (United Employers, Inc., and Paint Makers; BNA, 70:122.)

Such a clause may then protect the workers in the bargaining unit, as defined, from the insecurities of employment caused by the exercise of managerial discretion in matters like contracting-out work formerly performed by the plant work force. Where the union protests this action on the grounds that work, and employment opportunities, have been removed from the bargaining unit, it has sometimes been sustained by labor arbitrators. (Cf. Parke-Davis and Company and Allied Trades Council—AFL, *Labor Arbitration Reports*; Bureau of National Affairs, Vol. 15, pp. 111-115.)

To strengthen the claim of employees to given classes of work, a union may negotiate clauses which explicitly limit management's authority to sub-contract or, in other cases, to assign duties usually performed by hourly workers to supervisory employees. A careful survey of collective bargaining practices conducted on a continuous basis by the Bureau of National Affairs disclosed that 37% of the contracts sampled regulated the performance by supervisors of regular duties performed by employees in the bargaining unit, and 15% established some limits on the employer's right to sub-contract. (BNA, 65:24.) The relationship between imposing contractual restraints on management's authority to sub-contract is graphically illustrated by the agreement between the Aircraft Engineering Company and the International Association of Machinists, relating to sub-contracting:

"The Company shall not let a sub-contract on work

customarily handled in the plant, neither shall the Company subcontract while employees are on lay-off status who are capable of performing the work in question." (BNA 65:182.)

The flexibility of collective bargaining in tailoring remedial measures to the specific causes of employment instability is further demonstrated by the expansion of limitations on subcontracting to cover plant relocations as well. In the garment industry, where considerable insecurity has been created by the movement of plants away from traditional manufacturing centers, the International Ladies Garment Workers Union has succeeded in negotiating agreements which require union approval before a facility can be relocated. One such clause states:

"During the term of this agreement the Employer agrees that he shall not, without the consent of the Union, remove or cause to be removed his present plant or plants from the city or cities in which such plants are located." (Clothing Manufacturers Association and Ladies Garment Workers Union, BNA, 65:201.)

In the railroad industry, the so-called "scope rules" have served to establish employees' rights to certain categories of work. Within the context of railroad collective bargaining practice, scope rules define the coverage of specific agreements with reference to the appropriate occupational classifications coming under a union's jurisdiction. A conventional Telegraphers' scope rule reads:

"Rule 1 (a). This agreement shall govern the employment and compensation of:

Agents—Freight and Ticket (as shown in the wage scale).

Assistant Agents—(Freight and Ticket).

Agent—Telegraphers.

Agent—Telephoners.

Telegraphers.

**Telegrapher-Clerks.**

**Telephone operators (except telephone switch-board operators.)**

**Tower and Train Directors.**

<b>Towermen</b>	} The term "towerman" is synonymous with "leverman" and both operate
<b>Levermen</b>	
	{ interlocking switches on signals from a central point."

(Agreement Between the Chicago, Indianapolis and Louisville Railway and the Order of Railroad Telegraphers, effective May 1, 1953.)

The degree of employment security afforded by a particular scope rule is increased by the inclusion of a supplementary clause which declares that no work described in the scope rule can be removed without mutual consent. Thus, in the agreement cited above, Rule 1(b) gives explicit effect to the designation of the Telegraphers' positions spelled out in the preceding section:

"Unless otherwise agreed to by the authorized representative of the carrier and the duly accredited representative of the Organization, positions and/or work referred to in this agreement belongs to the employees covered thereby and no work of the classifications enumerated in paragraph (a) of this rule shall be removed therefrom except by mutual agreement."

In the adjudication by the National Railroad Adjustment Board of disputes arising under the terms of collective bargaining agreements, the various scope rules have given employees protection against instability of employment resulting from the arbitrary exercise of management authority in ordering the work force. In this manner, the scope rules have protected employees against displacements caused by attempts to consolidate jobs, (Houston Belt & Terminal Railway Company and Order of Railroad Telegraphers, NRAB, Third Division, Award No. 6937, March 29, 1955) assign work customarily done by em-

employees in the bargaining unit to supervisors, (The Nashville, Chattanooga & St. Louis Railway and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 6141, March 19, 1953) abolish a shift (Chicago & Eastern Illinois Railroad Company and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 6357, October 2, 1953) cancel a "temporary" job, (Gulf Coast Lines and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 3563, May 22, 1947) or abolish a job by transferring some of the work assigned to an employee in one seniority district to an employee in another seniority district. (Reading Company and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 6348, September 29, 1953.)

Scope rules have also been a consideration in efforts to ban the contracting-out of work. Shortly after World War I, the United States Railroad Labor Board on a few occasions sustained railroad union complaints that the contracting out of work usually performed by railroad employees, such as coach cleaning and maintenance of structures, violated their agreements with the carriers. (Decisions of the Railroad Labor Board, Vol. III, pp. 667, 687, 696; Decisions Nos. 1210, 1220, 1226). On a broader front, a union proposal for the discontinuance of the railroads' practice of contracting-out maintenance work was a major issue in the Shop-Crafts strike of 1922. (Harry E. Jones, *Railroad Wages and Labor Relations; 1900-1952*, Bureau of Information of the Eastern Railways, 1953, pp. 78-81.)

Demonstration of the fact that scope rules have, in many situations, provided for stabilization of employment should

not obscure the limited range of application of these provisions. That is, it is obvious that while the scope rules may mitigate marginal cases of instability of employment, they are not adequate to deal with gross displacements. In this event, railroad unions have had to turn to other, more appropriate measures.

Control of the distribution of available employment opportunities offers a broader approach to the problem of stabilizing employment, particularly where job insecurity is associated with cyclical fluctuations in business activity. In this respect, shorter hours of work has been a favored device of trade unions. A trade union economist has pointed out the close connection between proposals for shorter hours and the goal of stabilization of employment.

"The threat of unemployment and the possibility of minimizing it through the adoption of shorter work-weeks, has apparently been the most significant factor until now in generating union efforts to reduce the 8-hour day and 40 hour week. \* \* \*

"\* \* \* where technological and economic developments have threatened displacement of workers, many unions quickly have turned to consider the possibility of shorter hours of work as a means of aiding the stabilization of employment." (Seymour Brandwein, "Recent Developments," in *The Shorter Work Week; Papers Delivered at the Conference on Shorter Hours of Work Sponsored by the AFL-CIO, 1957*, pp. 71-72.)

The demand for shorter hours, as related to efforts to stabilize employment, historically has taken two forms: permanent reductions in the length of the work week, and temporary work-sharing arrangements. Permanent reductions in the length of the work week have, in recent years, reflected statutory endorsement of shorter hours as a device to promote employment stability. Thus the

establishment of effective maximum limits on the work week by National Recovery Administration codes, state legislation and the Fair Labor Standards Act of 1938, was largely motivated by the desire to equalize the distribution of available employment opportunities during the depression. Since that period, the 40-hour work week has become standard for most of American industry, (Joseph S. Zeisel, "The Workweek in American Industry 1850-1956," U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, January 1958, p. 27.)

Temporary reductions in hours of work have been widely used to distribute employment opportunities among workers in industries which are sensitive to seasonal and cyclical fluctuations. Typically, a work-sharing arrangement will call for the reduction in daily or weekly hours of work before any layoffs can be carried out. The stabilizing effect of shorter hours and the consequent work-sharing arrangements have been underscored by a Report of the U. S. Bureau of Labor Statistics.

"For short-time declines in business production, some unions have worked out plans whereby available work is distributed as evenly as possible among all the workers. These share-the-work plans have the effect of deferring lay-offs, or, if production is resumed before too long a time has elapsed, of preventing lay-offs altogether." ("Share-the-Work Provisions in Union Agreements", U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, June, 1940, p. 1340).

This same report indicated that in 1940 approximately 25% of a sample of 7,000 collective bargaining agreements contained some program for shorter hours and work-sharing to help stabilize employment. A later Bureau of National Affairs survey disclosed a similar incidence of work-sharing arrangements in labor contracts negotiated

during recent years (BNA, 60:301). A representative work sharing clause reads as follows:

" \* \* \* No regular employee shall be laid off so long as operations permit work-sharing on a 32-hour basis until after such work-sharing has been in effect for not less than five (5) consecutive weeks." (International Shoe Company, Monlinton Tannery and District 50-UMW; BNA, 65:304.)

When layoffs are actually instituted in a unionized situation, they are inevitably carried out with reference to the seniority of the employees involved. Seniority provisions, of course, were originally designed to cope with the problem of employment and job security. (Sumner Slichter, *Union Policies and Industrial Management*, The Brookings Institution, 1941, pp. 115, 122.) As such, they limit the exercise of management discretion and lend a degree of individual security to long service employees. Today, the use of length of service, as a criterion for the distribution of contracting employment opportunity is common in the American industrial relations scene. The Bureau of National Affairs reported that:

"Among contracts which refer to lay-off, seniority is almost always a factor in determining the order of reduction. In almost three cases out of four, it is the governing consideration." (BNA, 60:1.)

Collective bargaining in the railroad industry has been marked by similar attempts to stabilize employment by controlling the distribution of economic opportunity. In 1932, twenty-one unions representing railroad workers sought to negotiate a six-hour day on a national basis in order to spread available employment among their members. (Official Proceedings, Ninth Convention, Railway Employees Department, *supra*, pp. 7-11). When prolonged bargaining brought no agreement on this issue, additional efforts, albeit unsuccessful, were made to establish

the six-hour day on the railroads by congressional statute. (Six Hour Day For Employees of Carriers Engaged in Interstate and Foreign Commerce, Hearings Before The Committee on Interstate Commerce, United States Senate, Seventy-third Congress, Second session). Despite these setbacks, the railroad unions continued to press for shorter hours and by 1953, the forty hour week had been put into effect for most rail employees through the application of collective bargaining agreements. (Jones, *supra*, pp. 147-160.)

Work-sharing arrangements also have a venerable history in railroad labor relations. As early as 1912, the Chicago and North Western Railroad entered into such an agreement with shop craft workers as a protection against seasonal instability of employment. Thus, North Western's contract with the Brotherhood of Boilermakers, and Iron Shipbuilders and Helpers, effective December 1, 1912, contained the following clause:

"When it becomes necessary for the company to reduce expenses, the full force of boilermakers and helpers shall be retained and the time reduced to five (5) days per week, eight (8) hours per day; in any further reduction if men are then to be laid off, then the last employed will be the first laid off. (Cited in Presentation of the Railway Employees' Department of the AFL Before The United States Railroad Labor Board, Chicago, Illinois, Federated Shop Crafts Part Two, Volume One, 1921).

Besides the widespread use of work-sharing clauses to control the distribution of employment in the pre- and post-World War I period, railroad shop craft workers also sought protection against instability of employment which stemmed from either inept management scheduling of work or the need for emergency maintenance and repair

of road equipment. Hence, most shop craft agreements specified that:

"When it becomes necessary for employees covered by this agreement to work overtime they shall not be laid off to equalize the time. (Agreement Between Certain Carriers in the Southeast Region and Federated Shop Crafts, effective September 1, 1917.)

The Telegraphers' union has negotiated similar protection against job insecurities which stem from the exigencies or ineptness of managerial decision making. Rule 51 in the agreement between Telegraphers and North Western specifies that:

"A Telegrapher will not be required to suspend work during assigned hours or to absorb overtime." (The scope rule defines "telegrapher" to include all the occupations covered by the agreement.)

The antecedents of this rule may be traced back to the Telegraphers' national agreement negotiated during World War I.

From the foregoing discussion, it is clear that the systematic control of the distribution of employment opportunities has been a widely accepted approach to the problem of employment stabilization. If the Telegraphers' union had submitted a contract proposal calling for a reduction in hours of work of such a magnitude that consequently no employee would be displaced North Western, and the Court of Appeals, could scarcely maintain a position that the issue was not bargainable. Because the union has endeavored to stabilize employment by a more flexible proposal which allows joint discussions between the parties, it has been accused of infringing on management prerogatives. It is apparent that North Western's, and the Court of Appeals' concept of management prerogatives is as

broad as its view of stabilization of employment is narrow.

In addition to the more traditional approaches described above, efforts to promote stabilization of employment have taken a new direction in recent years. That is, since the end of World War II, dismissal compensation, or severance pay, and supplemental unemployment compensation, have come into increased prominence as collective bargaining issues. To be sure, a major objective of both of these programs is to provide a financial cushion for those employees who are permanently displaced or who suffer temporary layoffs. On the other hand, severance pay and supplemental unemployment benefits also have the effect of penalizing the employer for failing to take decisive steps to stabilize employment. Where these financial penalties cancel out, the economic inducements to reduce the size of the work force, a deterrent to displacements will be created and conversely, a premium will be placed on stabilizing employment in given situations. The degree of the deterrent—and effectiveness of the premium—will depend upon the level of benefits prescribed in each particular case. Hence, an alternative approach available to a union which seeks to promote stabilization of employment is to negotiate plans which contain relatively high benefit schedules.

In this respect, a National Industrial Conference Board survey of the operation of severance pay plans in industry has disclosed that employers, in fact, are highly sensitive to the costs of such programs. Thus, employers reported that the major disadvantage of these plans was the cost of financing the benefit payments, especially during times of declining business activity and large scale layoffs. (*Severance Pay Plans*, National Industrial Conference Board, Studies in Personnel Policy, No. 141, 1954, pp. 28-29.) In contrast, a premium for stabilizing employ-

ment is inherent in the provisions of many major supplemental unemployment benefit plans, like those in the automobile and aluminum industries, since they specify maximum limits to the benefit funds. Once these maxima are reached, employer contributions are stopped, and the contributions are resumed when layoffs necessitate the payment of benefits and reduce the level of the funds. (Cf. Supplemental Unemployment Benefit Plan Agreed to by General Motors and the United Auto Workers, BNA, Vol. 1, 20:299; and Supplemental Unemployment Benefit Plan Agreed to by Aluminum Company of America and United Steelworkers of America, BNA, Vol. 2, 56:623.)

The widespread incidence of severance pay and supplemental unemployment benefit plans attests to the prominence of these programs for stabilization of employment, particularly in the basic, durable goods industries which are subject to chronic cycle fluctuations in employment. In 1957, the Bureau of Labor Statistics reported that collective bargaining agreements covering approximately 1,800,000 workers outside the railroad and air transportation industries contained some provision for severance pay. In the last three years, employee anxieties over the impact of technological change on job security has stimulated the wider application of severance pay plans. A recent AFL-CIO study revealed that approximately two million workers have come under such plans since 1956 and that at least 35% of all employees represented by unions are so covered. (BNA, 45 LRR 54; Nov. 1959.) (*Collective Bargaining Clauses: Dismissal Pay*, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 1216, August, 1957, pp. 1-2.) Supplemental unemployment benefit plans also have enjoyed wide acceptance and since the negotiations of the Ford Motor Company—United Auto Worker agreement of 1955 they have spread to the steel, aluminum, agricultural equipment, rubber products, and electrical equipment industries. (BNA, 53:601-705.)

The railroad industry has gained the distinction of pioneering in the development of severance plans in the United States. As early as 1909, the Kansas City Southern Railway Company accepted the principle of compensating employees for displacement by agreeing to assume the financial burden of certain property losses sustained by employees when the company shifted the location of one of its terminals. In 1929, the Pennsylvania Railroad granted dismissal compensation, graduated with years of service, to employees when it abandoned the Baltimore, Chesapeake and Atlantic, and the Baltimore & Eastern railroads. The close connection between severance pay and stabilization of employment was demonstrated by an agreement negotiated by the Baltimore and Ohio Railroad and the unions representing non-operating personnel in January, 1935. The agreement specified that employees no longer needed at certain junctions had the option of choosing either dismissal compensation or guaranteed employment for one year. (Everett D. Hawkins, *Dismissal Compensation*, Princeton University Press, Princeton, N. J., 1940, pp. 165-166.)

These developments set the stage for the Washington Agreement of 1936, noted earlier in a different context. The terms of the Washington Agreement amplified the principle of dismissal compensation to embrace a variety of benefit programs which protected workers from the deleterious effects which the coordination of two railroads might have on their employment status. The Washington Agreement established five categories of compensation:

*A coordination allowance:* If a man is definitely displaced he is periodically paid compensation amounting to 60 per cent of his average monthly compensation for the twelve months preceding displacement. The duration of

this benefit is determined by the employees' length of service but cannot exceed five years.

*A displacement allowance:* For a period of five years any employee kept on the payroll of the carrier, but affected by the coordination project, shall not be subject to lower pay. The employee so affected shall be paid the difference between present compensation and compensation received before the consolidation.

*A separation allowance:* Even if an employee is retained at full pay, he may elect to resign and receive a lump sum payment determined by his length of service and previous compensation.

*A transfer allowance:* If a man is kept, but transferred because of a coordination, the carrier agrees to pay moving expenses.

*A property loss allowance:* If the transferred man has to sell his home below its fair market price, the carrier agrees to make up the loss.

The comprehensive character of the Washington Agreement and the scope of the benefits specified therein demonstrates that employment security has long been accepted as a bargaining issue in the railroad industry. It would be specious to deny the union the right to bargain effectively over its contract proposal in this case on the grounds that a consolidation within a carrier rather than between two carriers is involved. Both types of organizational adjustment reflect the impact of a similar complex of secular factors.

As opposed to the long history of bargaining over dismissal compensation, interest in supplemental unemployment benefits is a relatively recent occurrence in the railroad industry. It is significant to note, however, that

North Western was one of the first major carriers to enter into such an agreement with railroad unions. (Memorandum of Agreement Between Chicago and North Western Railway and Thirteen Unions Representing Non-Operating Employees effective May 8, 1956; R. 303.) The Agreement was designed to afford unemployed workers with total benefits including payments under the Railroad Unemployment Insurance system, equal to 75 per cent of "take home" pay and 60 per cent of base pay with a maximum of \$10.20 per day.

The last, and most direct, approach to the problem of stabilization of employment is the negotiation of contract clauses containing specific employment guarantees. This approach has taken two forms: First, work-crew manning requirements may be spelled out by the bargaining agreement. This means that if the Company chooses to carry out certain operations, it cannot reduce labor requirements to a level below that which is prescribed by the contract. In most cases, the size of the work force can be reduced only by displacing entire crews rather than by cutting the size of the crews. Because technological factors surrounding production often make it difficult, if not impossible, to displace entire crews and maintain efficient production, such provisions generally have the effect of stabilizing employment in a narrow range. Second, the employer may be obliged to provide a certain number of employees a minimum number of hours of work, or compensation thereof, for a given time period. This period may be as short as a week or as long as a year. In most situations, employment guarantees have been instituted to safeguard the employees from seasonal fluctuations and further instabilities created by management's failure, or unwillingness, to even out employment opportunities where this is possible.

Work crew provisions in industry generally specify both the size and occupational composition of the crew under consideration. An agreement between the International Longshoremen's and Warehousemen's Union and San Camitta & Sons declares that:

"The basic crew shall consist of ten (10) employees, members of the union, two of which shall be office and clerical employees, which basic crew shall not be reduced during the term of this agreement as extended and renewed. \* \* \*" (BNA, 65:62.).

In addition, it should be noted that other contract clauses which contain explicit manning ratios of employees to machines or which set limits on work loads and speed of operations have an effect on employment stability which parallels that of the work crew provisions; both serve to fix manpower requirements in a given range. (Cf. BNA, 65:121-123.)

Employment guarantees have taken many different forms, from single statements defining the minimum work week to comprehensive programs which afford complete job security over the course of the year. Thus, a typical weekly guarantee clause states:

"All regular employees shall be guaranteed not less than forty (40) hours work per week. \* \* \*" (Owl Drug Company and Teamsters; BNA, 53:101.)

Such minimum weekly guarantees are common in the United States today, particularly in the non-manufacturing sectors. In addition, a few bargaining agreements contain monthly guarantees of minimum hours of work or earnings where the month is the customary time unit for administrative purposes. In this respect, the Flight Engineers, who are also covered by the Railway Labor Act, have negotiated the following monthly guarantee with American Airlines, Inc.:

"In addition to base pay, Flight Engineers who have

completed two (2) years of service with the Company as a Flight Engineer shall receive, as a minimum guarantee for each full calendar month of service, flying pay at their applicable rates of compensation set forth in this Agreement for sixty (60) hours of flying, one-half day and one-half night. • • •", (BNA, 53:201.)

Interest in long-range, annual guarantees of employment dates back to the early 1930's when the onset of the depression stimulated more fundamental thinking about stabilization of employment. Further inducement to develop annual employment guarantees through collective bargaining was provided by the Fair Labor Standards Act of 1938. Section 7(b)(2) of that Act grants a partial exemption from the overtime pay requirements to those companies which "as a result of collective bargaining" guarantee employment for not less than 1,840 hours in any consecutive 52 week period. In 1940, the Bureau of Labor Statistics reported that fourteen union agreements included some annual employment or income guarantee. ("Annual Wages and Guaranteed-Employment Plans in Union Agreements," U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, August, 1940, pp. 283-289.) Since that time programs for the annual stabilization of employment have been established in several additional firms and industries. (BNA, 53:423-603.)

Perhaps the most famous guaranteed employment plan is that included in the agreement between George A. Hormel & Company and the Amalgamated Meat Cutters and Butcher Workmen. The plan, which originated in 1927, guarantees 52 equal pay checks per year to specified groups of employees. (BNA, 53:403-406.) It is noteworthy that the continued success of this plan has been attributable, in a large measure, to management's willingness to discard self-defeating notions of prerogatives and discuss specific administrative problems with the union as they

relate to the effective implementation of the guarantee. (Jack Chernick and George C. Hellickson, *Guaranteed Annual Wages*, The University of Minnesota Press, 1945, pp. 37-46.)

Historically, in the railroad industry, the negotiation of rules establishing work crew complements have been an integral part of industry bargaining practice. The size of operating crews, in particular, have been subject to continuing union-management determination. The following railroad contract clauses give an insight into the nature and extent of these rules governing crew size and complement:

"When men are available, all crews shall consist of a conductor, listman and two (2) brakemen." (Article 25, The New York Central Railroad, Zanesville and Western Sub-Division of Ohio Central Division, Rules and Rates of Pay for conductors and Trainmen; effective December 1, 1919, revised February 1, 1956.)

"In all yards classed as first class prior to November 16, 1922, a crew shall consist of not less than one foreman and two helpers and no change in present practice of manning yard engines in other yards will be made unless a change in operating conditions, constituting an entirely valid reason, exists." (Rule 0, Agreement between Chicago and North Western Railway and Brotherhood of Railroad Trainmen; covering Yardmen, effective July 1, 1944.)

"Way-freight trains will be manned by three trainmen on the following main lines: Between Chicago and Council Bluffs. Between Chicago and Elroy. Between Chicago and Milwaukee. (Rule 49, Chicago and North Western and Trainmen, *supra*, Road Service.)"

In recent years instability of employment has also caused the Brotherhood of Maintenance of Way Employees to turn to the negotiation of work crew clauses to afford a modicum of job security to its members. (Cf. Agreement Between the Brotherhood of Maintenance of Way Employees and the Reading Company, effective April 19, 1954.) In addition, that union has entered into a contract

with the Detroit, Toledo and Ironton Railroad (effective April 1, 1955) which makes future changes in the number of certain work gangs subject to negotiation. The relevant clause states that the carrier "will not change the number of section and system extra gangs without further negotiations with the General Chairman."

The sensitivity of certain classes of railroad employment to various economic and managerial sources of instability has also stimulated railroad unions to press for formal employment or income guarantees through collective bargaining. In this manner, the operating brotherhoods have frequently negotiated rules which guarantee minimum monthly mileage. The use of mileage rather than hours reflects the unique aspect of the dual wage system in effect in the railroad industry. Such a rule states:

"All regularly assigned firemen and helpers will be guaranteed a minimum of twenty-six hundred miles per month. Any time they may lose on their own account will be deducted from the guaranteed mileage at the rate of one hundred miles for each day lost. This rule applies to an extra fireman or helper representing a regularly assigned fireman or helper a full calendar month." (Rule 38(a), Chicago and North Western Railway, Revised Schedule of Wages and Rules Regulating Employment of Locomotive Firemen, Hostlers and Outside Hostler Helpers, effective November 1, 1951.)

The above rule deserves further attention for the manner in which it distinguishes between instability of employment arising from personal considerations of the individual employee and other factors outside the employee's control. Thus, time lost by workers "on their own account" may be deducted from the monthly guarantee.

In contrast to the monthly guarantees negotiated by the operating brotherhoods, it was the chronic fluctuation of employment from one month to the next which caused the

federated shop crafts to seek annual stabilization of employment in the Seaboard Airline Railroad Company. Shop craftsmen employed by this railroad suffered severe instability of employment because of sharp seasonal fluctuations in the movement of traffic and the managerial practice of budgeting maintenance and repair work on a monthly basis. Accordingly, in 1928, the federated shop crafts entered into a minimum force agreement with the carrier, whereby the carrier guaranteed a full year's employment to a specified number of workers distributed among the different crafts. The size of the minimum work force has been renegotiated each year and in 1959 covers 1,646 positions. (Agreement Between the Seaboard Air Line Railroad Company and the Federated Shop Crafts Providing for Minimum Force During the year 1959.) Since 1931, renegotiation of the minimum force requirement has been permitted in mid-year on the initiative of either party after January 31. As testimony to the good faith which has marked the administration of this plan, the minimum force requirements were changed in mid-year only three times between 1931 and 1947, when the railroad industry underwent major fluctuations in activity. (*Afros, supra*, pp. 167-171.) Moreover, both the union and management have agreed in their favorable evaluation of the operation of this plan..

"Management officials stated that the minimum force plan has increased worker productivity by reducing fear of layoff. \* \* \*

"Both management and the union stated that the plan had been advantageous for all concerned. The Company saved money, productivity increased, and labor turn-over and training costs decreased. Employees annual earnings increased and the spread of the work induced greater regularity of employment and wages." (*Afros, supra*, p. 181.)

While the Chicago and North Western never progressed to the point of establishing a formal employment guarantee, it is significant to note that this carrier long ago pledged itself to the development of a program for stabilization of employment as part of a broad venture in union-management cooperation. In 1925 North Western entered into a formal program of cooperation with the federated shop craft unions. This plan was in effect until 1929 and dealt with a wide range of issues concerning shop layout, expenditures for equipment and capital improvements and other matters. (Louis A. Wood, *Union-Management Cooperation on the Railroads*, Yale University Press, 1931, pp. 97-99, 133-180.) More to the point in this litigation, as an important element of the plan for cooperation, North Western pledged that "a minimum standard force would be established on its lines." (*Ibid.*, p. 218.)

The threats to stability of employment posed by consolidation of the facilities of single carriers has caused railroad unions to turn pragmatically to other measures to guarantee employment. When the Kansas City Terminal Railway Company announced that it was going to consolidate certain clerical work in an IBM machine center, the Brotherhood of Railway and Steamship Clerks negotiated an agreement with the carrier which specified that any reductions in force arising from this action would be accomplished by normal attrition. The agreement states:

"Reduction in force in the Audit Department resulting from the establishment of the machine bureau will be accomplished by normal attrition in the force of the employees, having seniority in the department on the date of this agreement." (Effective August 14, 1957.)

In other words, the present employees were indefinitely protected from possible displacement as a result of the installation of the new equipment. Only as those employees with seniority resigned, died or retired could particular

positions be abolished. Through collective bargaining, the carrier was brought to recognize its responsibilities not only to the abstract compulsions of "management prerogatives", but the concrete needs of its employees as well.

Finally, it must be noted that the particular proposal of the Telegraphers in the instant case is no more novel than other agreements concerned with stabilization of employment and job security. To begin with almost all collective agreements in the railroad industry contain provisions requiring a period of notice prior to job abolition, and railroads thereby have recognized that job abolitions constitute a subject for collective bargaining. Management's "right" to abolish positions was first limited in a more comprehensive manner over 35 years ago by a rule providing:

"Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules." (Rule 84 of the Agreement between the Delaware, Lackawanna & Western Railroad Co. and the Brotherhood of Railway and Steamship Clerks, cited in Doc. No. 2238, U. S. Railroad Labor Board, 5 R. L. B. 241, March 12, 1924.)

Although the foregoing rule may not have had stabilization of employment as its primary objective, it nonetheless makes clear that job abolition has long been and is a bargainable issue and not subject to the whim of "management prerogatives."

More importantly, over twenty years ago the Telegraphers negotiated a rule which, although limited to station agents is in substance identical to the one it has proposed to North Western here. The rule reads:

"2. The status of the part time stations now existing will not be changed except that those to which the agents travel may be made prepaid stations at the discretion of the Company.

"3. Hereafter agencies will be discontinued only by negotiation and agreement between the General Manager and the General Chairman, except as provided in Item 2." (Letter Agreement between the Lehigh Valley Railroad Company and the Order of Railroad Telegraphers, May 18, 1938.)

The continuity of such efforts to stabilize employment by preserving employment opportunities was further indicated when, as recently as 1957, the Great Western Railway Company and the Missouri-Kansas-Texas Lines agreed with the Railroad Yardmasters that positions will not be abolished during the life of the agreement except by negotiation and agreement between the parties.

"Carrier agrees to maintain during period provided in Article III of the Agreement of May 3, 1957, the Yardmaster positions assigned as of the date of this agreement, unless business conditions justify further reductions—in which event the Carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effected." (R. 346-349.)

From this examination of collective bargaining practice in industry in general and the railroad industry in particular it is apparent that there is no single path to stabilization of employment. The wide choice of alternative approaches to this problem was plainly stated in the pathbreaking Latimer report.

"Substantial security of income or employment, or both is everywhere more and more recognized as a primary goal of modern democratic societies. This goal cannot be achieved by any one method. In all modern societies many institutional arrangements, programs and procedures have been adopted, designed to contribute to stability of income or employment.

• • • (Guaranteed Wages, *supra*, p. 429.)

Among the various institutional arrangements and procedures available to a democratic society for the resolution of the problem of employment, security, collective bargain-

ing has proven its capacity to satisfy the needs of the parties immediately concerned. Well-established collective bargaining procedures, endorsed by the Railway Labor Act have at all times been equally available to North Western in considering the Telegraphers' proposal for stabilization of employment.

## V.

### **COLLECTIVE BARGAINING HAS BEEN A CONCOMITANT OF ECONOMIC PROGRESS IN THE RAILROAD INDUSTRY. AFFIRMATION OF THE DOCTRINE OF THE COURT OF APPEALS WOULD MATERIALLY IMPAIR THE BARGAINING PROCESS.**

Both North Western and the Court of Appeals have implicitly linked the unrestrained exercise of "management prerogatives" with efficiency and economic progress. Hence, the Telegraphers' contract proposal is decried because it would purportedly nullify the economies and efficiencies flowing from certain major organizational changes in the operation of the North Western Railway. In a similar manner, almost any union proposal arising in a vigorous collective bargaining relationship could be characterized as an attempt to fetter management prerogatives and constrain the forces of economic progress.

Such a position cannot be maintained on either philosophical or empirical grounds. First, a democratic society does not blindly worship considerations of economic efficiency alone. Beyond the arithmetic computations of an increasing gross national product lies the additional problem of determining how the fruits of increased production and the consequent burdens of technological unemployment are to be distributed among employees, employers and other major groups in society. Collective bargaining has been endorsed as a matter of national policy because of its proven capacity to accept economic progress while tempering the impact of these advances on the worker.

Second, the historical record of economic activity in the railroad industry reveals that, in fact, collective bargaining has been the concomitant of prodigious increases in productivity. Between 1920 and 1957 railroad employment declined by more than 50 per cent while "production," calculated in terms of revenue traffic units, reached new highs for the period. These gains in labor productivity, which have taken place in a context of collective bargaining, are set forth in the following table:

Year	Number of Employees	Revenue Traffic Units Thousands	Employment Per Million Traffic Units
1920	2,022,832	504,003,546	4.01
1930	1,487,839	437,079,238	3.40
1940	1,026,848	420,777,915	2.44
1945	1,419,505	864,435,209	1.64
1950	1,220,401	652,097,758	1.87
1956	1,043,447	703,446,897	1.48
1957 Preliminary	984,784	669,900,000	1.47

Source: Interstate Commerce Commission Statistics of Railways in the United States, Statements M-300 and M-220. The statistics for each year from 1920 to 1957 are set forth in Exhibit 17, Hearings before the Subcommittee on Surface Transportation, *supra*, Part 4, p. 2052.

Despite this auspicious record of technological progress which has taken a heavy toll of aggregate railroad employment, the Court of Appeals has sought to revive archaic notions of inherent management prerogatives by making ill-founded determinations of the non-bargainability of union proposals. Affirmation of this doctrine would contravene the history of collective bargaining as it has developed under the Railway Labor Act and would strike a severe blow at the effective operation of the bargaining process.

Throughout the many years of collective bargaining which followed the passage of the Railway Labor Act, the

parties have, by their conduct, given meaning and life to the express language of the statute, imposing the obligation upon them to bargain on all matters in order to maintain peace in an industry vital to the nation's welfare. In this period, railroads and unions have bargained about a wide variety of subjects touching every aspect of the employment relationship. As indicated earlier, job security has been a pervasive issue in railroad collective bargaining. Non-bargainability was advanced nationally as a legal justification for refusing to adhere to the provisions of the Railway Labor Act only as recently as 1953. In that year, the Employees' National Conference Committee representing all the non-operating brotherhoods asked certain railroads to negotiate the provisions of a health and welfare plan. Instead of bargaining collectively on this matter, the Carriers' Conference Committees representing generally the Class I railroads in the country filed a declaratory judgment action seeking a court determination that the subject was not bargainable under the Railway Labor Act. The District Court for the Northern District of Illinois, Eastern Division, dismissed the action as not presenting a justiciable issue. The Court of Appeals for the Seventh Circuit reversed this judgment, one of the judges dissenting.\*

This Court vacated the judgment of the Court of Appeals and ordered the action dismissed as moot when it appeared that pending ruling on the Petition for Certiorari practically all of the railroads involved had entered into an agreement providing for a health and welfare program.\*\*

Coincidental with the instant case, railroad management has apparently adopted a widespread policy of raising the

\* *The Akron, Canton & Youngstown Railroad Co. v. C. R. Barnes*, 215 F. 2d 423 (C. A. 7, 1954).

\*\* *Barnes v. Akron, Canton & Youngstown Railroad Co.*, 348 U. S. 893 (1954).

question of bargainability as a device to relieve it of the necessity for negotiating with the union over matters of paramount importance. A partial survey of the experience of the standard railway labor organizations discloses that since 1956 railroad management has, on over fifty known occasions, balked at negotiating with the union on the grounds that the specific issue pressed by the union was non-bargainable under the provisions of the Railway Labor Act. The accompanying table shows the increased incidence of this tactic and the kinds of issues which have failed to meet management's sterile definition of bargainability. Despite years of collective bargaining over the subjects involved railroad management now finds severance pay, procedures for handling grievances, contracting out, the rates of pay for operators of new machines, the details of health and insurance plans, reduction in hours, and the checkoff of union dues to be unsuitable topics for collective bargaining. In several situations the carrier unilaterally cancelled an existing article of the collective agreement and refused to entertain the union's protest on the ground that the issue was non-bargainable. Thus, in recent years, the concept of non-bargainability has been so extended by management as to throw a cloud over all bargaining subjects except wages in the narrow pecuniary sense of the term.

In some situations, like that involving the 1957-1959 negotiations between the Brotherhood of Maintenance of Way Employees and various carriers throughout the nation, management has agreed to bargain over a given union proposal without receding from its stand that the subject matter of the proposal is "non-bargainable" under the Railway Labor Act. Resort to such a tactic casts in sharp relief the enervating effect which the Court of Appeals' doctrine would have on the collective bargaining process. During the course of these conditional nego-

## Instances Where a Carrier Asserted That Subject of Employees' Notice Was Not Bargainable Under the Railway Labor Act:

Organization	Date of Notice	Carrier	Subject of Notice
Certain Standard Railway Labor Organizations	January 16, 1953	Union Pacific System	Revision of Hospital Ass'n Plan to provide coverage for retired employees
Switchmen's Union of North America	October 1, 1953	Carriers generally throughout U. S. on which organization holds representation	Health and Welfare Insurance Plan
Brotherhood of Locomotive Engineers	January 9, 1954	Central of Georgia	Carrier unilaterally changed certain train assignments of employees
(3) Brotherhood of Locomotive Firemen and Enginemen	May 5, 1954, cancelled on July 11, 1955; New Notice filed July 11, 1955	Lake Terminal Railroad	Company unilaterally changed working conditions and job content without notice or agreement by installing radio-telephone equipment on locomotives and requiring engine crews to handle same
Brotherhood of Maintenance of Way Employees	April 2, 1955	Carriers generally	Employee and employer contributions to the cost of hospital and medical insurance programs
Brotherhood of Locomotive Firemen and Enginemen	April 26, 1956	Louisville & Nashville Railroad	Rule providing for payroll deductions for periodic union dues, initiation fees, assessments and insurance premiums where included in monthly dues
Brotherhood of Railway & Steamship Clerks	September 21 and 24, 1956	Pullman Company (5), Pennsylvania Railroad and New York New Haven & Hartford	Protection of the interests of employees in case of termination, cancellation or modification of any contract by the Pullman Company and other railroads, or resulting from abandonment, transfer, consolidation or merger
Brotherhood of Locomotive Engineers	September 27, 1956	Central of Georgia	Carrier filed 30 day notice of cancellation of a provision of the existing agreement. Carrier asserted Section 8 notice not required. Therefore it did not have to bargain

Organization	Date of Notice	Carrier	Subject of Notice
Brotherhood of Locomotive Engineers	January 29, 1957	Atchison, Topeka & Santa Fe	Supplemental Annuity Plan
Brotherhood of Locomotive Engineers	February 13, 1957	Central of Georgia	Carrier filed 30 day notice of cancellation of a provision of the existing agreement. Carrier asserted Section 6 notice not required; therefore it did not have to bargain
Brotherhood of Railway & Steamship Clerks	March 5, 1957	The Troy Union Railroad Company	Protection of interests of employees effected by curtailment of service of the Company
(1) Brotherhood of Maintenance of Way Employees	May 22, 1957	Carriers generally throughout U. S. on which organization holds representation	Minimization of seasonal fluctuations in employment through periodic conferences with organization representatives
(1) B. M. W. E.	May 22, 1957	Carriers generally	Prior notice, conference and agreement upon changes in work methods that would change working conditions of employees
(1) B. M. W. E.	May 22, 1957	Carriers generally	Prior notice, conference and agreement upon changes in track section limits
(1) B. M. W. E.	May 22, 1957	Carriers generally	Prior notice, conference and agreement upon details of operations involved in establishment of mechanized track gangs
(1) B. M. W. E.	May 22, 1957	Carriers generally	Agreement upon rate of pay for, and method of filling positions of machine operators before new machines are put into service
(1) B. M. W. E.	May 22, 1957	Carriers generally	Management to furnish schedule of current agreed upon rates of pay for all positions covered by the contract
(1) B. M. W. E.	May 22, 1957	Carriers generally	No contracting out of work covered by agreement except by agreement with organization representative

Organization	Date of Notice	Carrier	Subject of Notice
(1) B. M. W. E.	May 22, 1957	Carriers generally	Severance pay for employees adversely affected by force reductions or changes in work methods
Brotherhood of Locomotive Engineers	September 26, 1957	Chicago, Minneapolis, St. Paul & P. Railroad	Notice for reprint of schedule
(2) Brotherhood of Railway and Steamship Clerks	February 11, 1958	Boston and Maine RR.	Substantially identical to proposal in case at bar
Brotherhood of Locomotive Engineers	March 19, 1958	Louisiana & Arkansas R. R.	Carrier unilaterally established inter-divisional runs. Asserted subject was not bargainable
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Substantially identical to proposal in case at bar
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Rule governing procedure and pay for time lost in discipline cases
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Rule governing procedure and pay for time lost in physical examination.
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Rule governing handling of communications governing train movements
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Conferences and special Boards of Adjustment to handle grievances
Brotherhood of Locomotive Engineers	May 31, 1958	Chicago & Eastern Illinois R.R.	Rule providing that engineers not required to operate without firemen
(5) Brotherhood of Railway & Steamship Clerks	June 23, 1958	Chicago, Milwaukee, St. Paul & Pacific Railroad	Protection of interest of employees affected by transfer of operation

Organization	Date of Notice	Carrier	Subject of Notice
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Mutuality and uniformity in application of rules governing time limits on handling claims and grievances
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Collective agreement to constitute entire contract governing terms and conditions of employment; agreed upon form of application for employment; preference for employment of experienced employees regardless of age
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Carrier to provide at all locations such physical operational and employment conditions as will assure to the greatest degree practicable under the circumstances the safety, health, comfort and convenience of the employees
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Establishment of plan for compensation of employee injuries, sickness and deaths
Brotherhood of Railway & Steamship Clerks	September 22, 1958	Southern Pacific Southern Lines	Plan for employment stabilization including period of protection, rehabilitation period and severance allowance
Brotherhood of Locomotive Engineers	November 1, 1958	Union R. R. (Pittsburgh)	Carrier unilaterally changed job requirements of Hot Metal Crews. Asserted issue not subject to Section 6 Notice
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Rule governing contracting out of work coming within the scope of the agreement
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Rule establishing procedures for investigation, handling of grievances
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Rule governing handling of communications governing train movements

Organization	Date of Notice	Carrier	Subject of Notice
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Conferences and Special Boards of Adjustment to handle grievances
Brotherhood of Locomotive Firemen and Enginemen	February 1, 1959	Des Moines Union Railway	Rule governing procedure and pay for time lost in physical examination; right of employee to secure independent and disinterested medical examiner in the event he is disqualified from work by company examination
Seven Standard Railway Labor Organizations affiliated with Railway Labor Executives' Association	February 20, 1959	Central of Georgia	Rule providing for pay for attending rule-book and physical examinations
(5) Brotherhood of Railway & Steamship Clerks	February 20, 1959	St. Paul Union Depot Company	Prohibition against supervisors doing work of employees under agreement
Brotherhood of Railway Signalmen	April 2, 1959	Chicago & Eastern Illinois Railroad	Rule requiring that motor cars be equipped with proper communication equipment and operated on orders and within limits to avoid accidents
Brotherhood of Locomotive Firemen and Enginemen	April 4, 1959	Alliquippa & Southern Railway Co.	Company unilaterally changed working conditions and job content without notice or agreement by installing radio-telephone equipment on diesel and requiring engine crews to handle same
(5) Brotherhood of Railway & Steamship Clerks	April 4, 1959	Lehigh Valley Railroad	Reduction in work day for general office forces
(5) Brotherhood of Railway & Steamship Clerks	April 4, 1959	Lehigh Valley Railroad	Provisions for notice and consultation for displacements of employees due to merger, consolidation, coordination, abandonment, transfer, etc.
Brotherhood of Locomotive Engineers	April 8, 1959	Southern Pacific-Pacific Lines	Construction of suitable facility to provide accommodations for employees during lay-overs

Organization	Date of Notice	Carrier	Subject of Notice
Order of Railway Conductors and Brakemen	April 15, 1959	Southern Pacific Co.	Construction of suitable sleeping accommodations for employees for use in lay-overs
Brotherhood of Locomotive Engineers	April 28, 1959	New York Central System	Maintaining minimum temperature levels in diesel locomotive cabs
Order of Railroad Telegraphers	May 5, 1959	Southern Pacific Lines-Texas & New Orleans R. R. Company	Severance pay plan for employees adversely affected by reductions in force
Order of Railroad Telegraphers	May 14, 1959	Atchison, Topeka & Santa Fe Ry. Co.	Revision of scope rule to include certain classes of work, prevent unilateral removal of positions and/or work from job classifications specified in scope rule; additional proposal substantially identical to proposal in case at bar
Order of Railroad Telegraphers	June 2, 1959	Chicago & Eastern Illinois R. R.	Rule governing consolidation of separate jobs covered by agreement
(4) Order of Railroad Telegraphers	June 2, 1959	Chicago & Eastern Illinois R. R.	Severance pay plan for employees adversely affected by reduction in force
(4) Order of Railroad Telegraphers	June 2, 1959	Chicago & Eastern Illinois R. R.	Rule preventing unilateral removal of positions and/or work of employees covered by jurisdiction of the Organization
Brotherhood of Locomotive Engineers	July 7, 1959	New York Central System	Rule permitting use of visual contact lens and hearing aids by employees
(4) Brotherhood of Railway & Steamship Clerks	July 10, 1959	Central of Georgia	Agreement to protect interests of employees when the carrier introduced electric machines to perform clerical work
Eleven Standard Non-Operating Railway Labor Organizations affiliated with Railway Labor Executives' Association	September 1, 1959	Carriers generally	Improvement and extension of hospital, surgical and medical protection; group life insurance

Organization	Date of Notice	Carrier	Subject of Notice
Brotherhood of Locomotive Firemen and Enginemen	September 9, 1959	Missouri Pacific Railroad Co. (Gulf District)	Rule providing for payroll deduction plan for employees participating in the Blue Cross-Blue Shield Health Security program
Railroad Yardmasters of America	October 1, 1959	Carriers generally	Sickness insurance supplemental to railroad Unemployment Insurance Act
Four Standard Operating Railway Labor Organizations affiliated with Railway Labor Executives' Association	October 1, 1959	Union Pacific Railroad Co. (Northwestern District)	Rule permitting use of visual contact lens and hearing aids during physical examinations
(5) Brotherhood of Locomotive Engineers	October 30, 1959	Monongahela Connecting Railroad	Cost-of-living adjustments, daily rates, premium pay, shift differentials, holidays, vacation plan, health insurance and pension benefits

(1) The dispute arising from this group of proposals was disposed of by Mediation Agreement of October 7, 1959, NMB Case No. A-4987, on terms much less favorable to the employees than those contained in the original proposals after the National Mediation Board persuaded carrier representatives to confer without receding from their basic position that the proposals were "non-bargainable". The disposition exemplifies both the fact that proposals are the starting point for, not the end of, collective bargaining, and the impact of the decision below in loading the scales on the management side.

(2) The dispute arising from this proposal was disposed of on terms substantially less favorable to the employees than those contained in the original proposal after a strike had been called and while proceedings to enjoin the strike were pending in United States District Court for Massachusetts.

(3) Lake Terminal Railroad attempted to seek relief in court after the General Chairmen of the BLF & E and BRT instructed their members to refrain from using radio equipment. The carrier started litigation May 11, 1954. A Mediation Agreement (Case No. A-4931) was reached between the parties on September 15, 1955. The Agreement provides for removal of radio-telephone equipment from locomotives and withdrawal of pending litigation by the Lake Terminal Railroad.

(4) Carrier declared that portions of the organization's proposals were non-bargainable but did not enumerate specific issues.

(5) Carrier reserves the right to question the bargainability of any proposal included in this list.

SOURCE: Reports provided by the officers of the indicated Railway Labor Organizations, from an examination of their correspondence.

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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1959.**

**No. 100**

**THE ORDER OF RAILROAD TELEGRAPHERS,**  
**A VOLUNTARY ASSOCIATION, ET AL.,**

*Petitioners,*

**vs.**

**CHICAGO AND NORTH WESTERN RAILWAY**  
**COMPANY, A CORPORATION,**

*Respondent.*

**RESPONDENT'S BRIEF ON THE MERITS.**

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CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, A CORPORATION,  
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**RESPONDENT'S BRIEF ON THE MERITS.**

---

**STATEMENT.**

This is a lawsuit between Chicago and North Western Railway Company ("North Western") and The Order of Railroad Telegraphers ("ORT"). The issues it raises are shaped by the facts of record. The ORT's brief is, however, strikingly preoccupied with "unions" and "employers" in a broader setting not defined by a judicial record. The ORT's statement of the case thus omits all reference to those facts in the record which bear most heavily on whether *this union* is precluded from striking *this employer* on the facts of *this record*. These omissions are especially significant in terms of (1) the direct relationship shown by the record between the ORT's demand and North Western's Central Agency Plan as approved by the regulatory

commissions of South Dakota, Iowa, Minnesota, and Wisconsin; and (2) the efforts made by North Western to bargain about the Plan upon any basis other than the veto power over it sought by the ORT as a hedge against its failure to persuade the regulatory commissions to reject the Plan on its merits.

Preliminarily, it should be noted that no effort was made to challenge the evidence of record with respect to the seriousness of the interruption to interstate commerce, and the consequent adverse effect on the public, of the proposed strike, or of the irreparable injury to North Western. A major interstate carrier in nine states, North Western also transports over 80,000 commuter passengers in the Chicago area each work day; and the stoppage of its operations would paralyze the downtown Chicago area and other parts of the metropolitan community (R. 77-79). As the largest switching railroad in Chicago, to which many thousands of plants and factories look for rail service in either originating or terminating traffic, a strike would have had immediate and lasting effects on the operations of these industries (R. 78). And not only would Chicago have been affected, but also the rural territories in the large grain-growing area dependent on North Western, as well as the iron ore country to the North which looks to North Western for dock and ore hauling services (R. 80-81). Within North Western's own family of approximately 18,000 employees, payrolls of \$330,000 a day would cease; and the daily revenue loss to North Western was estimated at \$650,000 (R. 81). Diversion of traffic inevitably takes place during a strike, and much of the traffic so diverted is permanently lost to the rail carriers (R. 81).

## **1. The Relationship of the Demand to the Central Agency Plan.**

### **(a) The Background of the Central Agency Plan.**

On April 1, 1956 North Western acquired a new management (R. 75-6). The first quarter loss had been \$8,000,000, and the cash position was deteriorating so fast as to place the payrolls in jeopardy (R. 82). A principal reason for this was that North Western had lagged badly in the adaptation of its operations to new and changed conditions, with the result that it had the worst (i.e., the highest) ratio of wage and salary expense to the revenue dollar of any railroad (R. 84). It was still operating with 260 steam engines; cars in need of repair were standing idle all over the line; and the right of way was in such bad condition that North Western was not competitive on freight schedules. There was a declining amount of business to the inevitable detriment of everyone connected with the railroad—management, labor and the public (R. 82-83).

The railroad business, no longer a monopoly, has radically changed and is today one of the most highly competitive businesses in the United States (R. 84). Railroads are competing with pipelines, barges, trucks, buses, airplanes and private automobiles, and with each other (R. 84). Additional costs, attributable to inefficient operations, can no longer be passed on to the public in the form of higher rates; and, in fact, North Western has been acting to reduce rates on grain, coal, and other items important to the territories served by it (R. 84-85). Railroads in general, and North Western in particular, must be concerned with constantly increasing productivity and with eliminating waste and inefficiency wherever found (R. 84-85).

The new management took many steps to improve the physical condition and the competitive position of the rail-

road (R. 83-88). But this modernization served to make new jobs as well as to eliminate old ones. North Western installed an electronic system which enables it to determine at any moment the location of its freight cars; and this created a number of new positions for members of the ORT (R. 86).<sup>1</sup> Many of the reductions in personnel incident to modernization programs have not been net reductions in force, because the funds saved from the elimination of wasteful practices have been diverted to useful projects. The effort has been to root out waste and to transfer the dollars saved to expenditures which will enable North Western to do a better transportation job at a cheaper price (R. 87-88). There has, of course, been a substantial net reduction in the number of North Western's employees, but the essentiality of this in staving off bankruptcy is demonstrated by the fact that, because of wage increases, North Western's annual payrolls were \$16,000,000 larger at the time of this litigation than they would have been on April 1, 1956, assuming the same number of employees on both dates (R. 87).

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1. North Western placed in evidence (R. 296-8) a compilation of ORT positions abolished, and those newly established, since December 3, 1957. Excepting those positions affected by reason of the Central Agency Plan, this shows a net increase. In his testimony Mr. Leighty, President of the ORT, referred vaguely to the "slaughter" of 100 jobs over and above those involved in the Central Agency Plan (R. 120). When pressed on cross-examination, he could not identify these jobs with any precision (R. 141-2, 322); and the only specific occasion of job losses he cited was the taking over by North Western of the operation of its wholly-owned subsidiary, the Omaha. This consolidation through lease had been approved by the Interstate Commerce Commission in December, 1956, a year before the demand; and in that proceeding the Railway Labor Executives' Association, of which Mr. Leighty is also President, withdrew its opposition in consideration of North Western's agreeing to observe the so-called Oklahoma Conditions (R. 323). On cross-examination, Mr. Leighty said that he could not remember this agreement (which presumably made him a party to the "slaughter") (R. 142). The Oklahoma Conditions protect employees for four years against adverse effects (R. 142-3).

North Western was laid out in the '50's, '60's and early '70's of the last century when there were no hard roads, automobiles or telephones. In consequence, the stations were laid out a short distance apart, according to the length of time it took a farmer to carry a load of grain by horse over dirt roads to the station and to return home in one day (R. 88-90). Since then there has been a transportation revolution. The hard road and automobile appeared; and the telephone has enabled customers to do business with the railroad stations without the necessity for traveling to the station (R. 88).

On April 1, 1956, there were several hundred stations where only one man was on duty (R. 88-89). Many of these stations were on branch lines from which passenger trains had disappeared; and at many of them the freight trains passed at hours when the agent was not even on duty because of an ORT requirement that each agent's day of service must begin at 8:30 a.m. (R. 89, 187). Studies were made at these stations and it was found that in many instances North Western was paying a station agent a full day's pay for 12, 15 or 30 minutes' work, and in certain cases as much as \$300 for each hour actually worked, whereas at the same time North Western was starving for funds to plow back into its system in the form of roadway improvement and maintenance, new equipment, and other modernization programs (R. 89).

**(b) The Development of the Central Agency Plan.**

North Western formulated a program—the Central Agency Plan—which recognized these changed conditions. After a careful individual study of each agency station, North Western established a central area station, extending the service area of the agent at that station to a neighboring station or stations within a feasible service area, taking into account the hard road, the telephone and the

automobile (R. 89-90). The agent at the central agency station goes to the associate stations by automobile, the railroad paying him mileage. The shipper still gets substantially the same agency service that he would have if the agent were there all the time. Instead of calling the agent four blocks away by telephone, he calls him four miles away at North Western expense (R. 90).

**(c) The Response of the State Commissions to the Central Agency Plan.**

North Western presented petitions to effectuate the Central Agency Plan to the public utility commissions of South Dakota, Iowa, Minnesota and Wisconsin. The South Dakota case was the first filed, on November 5, 1957 (R. 90, 91).

Hearings were held before the South Dakota Commission at various points throughout the state beginning November 26, 1957 and ending January 17, 1958 (R. 178). The ORT appeared in those proceedings to protest the granting of the authority sought, presented evidence, and, at the conclusion of the hearings, filed a brief and participated in oral argument before the Commission. On May 9, 1958 the Commission entered an order not simply authorizing the program but directing North Western to put it into effect forthwith (R. 172-211). The Commission concluded from the evidence that the Plan did not involve the abandonment of any station or the withdrawal of the agent therefrom, and that, accordingly, it did not come under the provision of the statutes relating to these matters (R. 188). It elected to enter its order under another section of the South Dakota statutes which authorizes the Commission on its own motion to order, as distinct from merely to authorize, changes in station operations where necessary or desirable in the public interest. The Commission noted that the expenses of the stations in question exceeded the related revenues by \$170,369 in 1956, whereas if the Central

Agency Plan had been in effect there would have been a surplus of \$58,884 (R. 182). The Commission found (R. 192) that the agent's work load varied from 12 minutes per day at Farmer, South Dakota, to two hours per day at Oneida, with an average work load of only 59 minutes per station at the 69 subject stations. The Commission further found (R. 192):

"That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need, constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates, \* \* \*"

The ORT has tried to suggest that the South Dakota Commission, in its disposition of applications for rehearing, modified in some manner the mandatory character of its order. This is not the case. In its order denying rehearing (R. 340-42) the Commission said that it was "important to re-emphasize the precise nature of the Order it has entered. What it has done is to authorize *and direct* the carrier forthwith to place in effect the Central Agency Plan; and, pending further report by the carrier as to the actual operation of this Plan, it has deferred action upon the carrier's request for authority to abandon entirely the stations in question." The Commission noted that the applications for rehearing had been founded in large part "upon alleged contractual limitations upon the carrier which, if they do in fact exist, might interfere seriously with the economies and efficiencies to be realized by the carrier through the Central Agency Plan."<sup>2</sup> The Commis-

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1. Emphasis is supplied throughout this Brief.

2. As the Court of Appeals notes in its opinion (R. 379), throughout the state commission proceedings the QRT asserted that the Central Agency Plan could not be effectuated under the limitations of its existing contracts with North Western. North Western has denied that this is so; and this issue as to the applica-

sion expressly disavowed any intent or purpose to interpret the existing agreements (R. 342), that function being committed by Congress under the Railway Labor Act to the Adjustment Board. To the extent, however, that any existing agreements should, upon proper interpretation or application, prove to be a barrier to the realization in the fullest measure of the economies contemplated by its order, the Commission reserved ruling on North Western's request to abandon entirely the agencies in the program. Meanwhile, North Western continued under the duty of obeying the Commission's command to place the Plan into effect.

The petition with the Iowa Commission was filed January 24, 1958. Hearings were held beginning March 18, 1958 and ending June 6, 1958; and in these hearings also the ORT appeared as a protestant. On August 11, 1958, the Commission authorized the Plan to be put into effect immediately (R. 216-46). The Iowa Commission noted the evidence before it to be (R. 227) that "(T)he present average station work load per work day is 1' 14" which is a decrease of 28% from 1951 and the estimated average work load under (the) proposed program would be 3' 15". It went on to say (R. 231):

"\* \* \* In common with all other public enterprises operating under a profit system the applicant is compelled, by economic necessity, to curtail inefficient operation. In addition thereto, as a railroad carrier operating in interstate commerce, it is obligated to effect all possible economies, even though it remains subject to state authority with respect to a matter such as the one here under consideration."

tion or interpretation of an existing contract would appear to present a "minor dispute" under the Railway Labor Act. Although the Plan was placed in effect in South Dakota and Iowa in May and August of 1958, respectively, no grievances or claims for lost pay based upon the ORT's construction of the existing contracts were submitted to North Western until after the District Court's judgment had been entered.

In its formal findings the Commission further recognized the national, as well as the local, interest in the program in these terms (R. 235-6):

"\* \* \* The problem of granting some relief has been before the National Congress. Savings must be made by reducing or eliminating service no longer needed. The case before us is a proposal to reduce agency service to the level of actual need. It is not one of complete discontinuance. It is the intent, according to evidence, to use the resultant savings for betterments and improvements such as the upgrading of branch lines, purchase of new cars, repair of cars so that they can be furnished to the shipper in better condition for loading and to otherwise better equip the railroad plant so as to insure efficiency, economy and adequate rail transportation."

Following the issuance of the South Dakota and Iowa orders, North Western placed them in effect promptly, recognizing fully its contractual obligations as to notice (R. 93). Service has since been furnished without difficulty by North Western and to the apparent satisfaction of the public (R. 214, 235).

Petitions for authority to effectuate the Central Agency Plan were filed in Minnesota on January 24, 1958, and in Wisconsin on April 14, 1958 (R. 90-91). Full hearings were held by both commissions in which the ORT appeared as a protestant. This Court may take judicial notice of orders subsequently entered by these commissions approving the Plan (Minnesota—Docket A-7559—November 12, 1958; Wisconsin—Docket 2-R-3380—January 20, 1959).

**(d) The ORT's Response to the Central Agency Plan.**

As indicated above, one of the forms of response by the ORT to the Central Agency Plan was to intervene as a protestant in all of the state commission proceedings, to present evidence in opposition, to cross-examine the North

Western's witnesses on the merits of the Plan, to file briefs and to participate in final oral arguments. With the entry of commission decisions uniformly adverse to its position, the ORT has sought to upset those decisions; and to prevent the Plan from being put into effect, under the judicial procedures available in each state, thus far without success.<sup>1</sup>

The most significant response of the ORT to the Plan, however, was of an entirely different character. On December 23, 1957, six weeks after the filing of the first petition in South Dakota, ORT sent North Western a letter under Section 6 of the Railway Labor Act requesting that the existing collective bargaining agreement between the parties be amended by adding the following provision (R. 32):

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

North Western, through Mr. T. M. Van Patten, its Director of Personnel, informed ORT that it did not consider this proposal for a change in the contracts to be legally within the scope of Section 6 of the Railway Labor Act, although he signified his readiness to confer (R. 33-34). Conferences were held, but ORT later invoked mediation under the Railway Labor Act and, on February 24, 1958,

1. Mr. Schoene, the ORT's counsel who represented it in all of the proceedings before the state commissions, in a public speech reprinted in the May, 1959 issue of the ORT's magazine, complained that he had found the commissions "very amenable to the railroads' suggestions;" and he went on to say: "I cannot believe that the commissions in Iowa, South Dakota, Wisconsin, and Minnesota, in authorizing the wholesale station abandonments that they have authorized, not only on the Chicago Northwestern, but also on the Rock Island, on the M&StL, on the Minnesota Western, were *honestly and objectively* weighing the public interests." This confirms the general attitude the ORT has taken towards regulation in respect of the Central Agency Plan: If the state commissions reject our version of the public convenience and necessity, we will still make it prevail by other means!

the National Mediation Board began mediating the matter (R. 43-44). After various meetings with the parties, the Board closed its files on June 16, 1958 (R. 51). The Board had asked the parties to arbitrate on May 27, 1958, but ORT declined on May 28, 1958 and subsequently North Western declined on June 12, 1958 (R. 49-50).

On July 10, 1958, ORT circulated to all its members a letter and Strike Ballot concerning the dispute (R. 53-59). That letter stated in part (R. 54, 57):

"Last fall a program of this sort that is of vital concern to our members was initiated by this management. This program is directed at the elimination of the vast majority of agents serving one-man stations. Proceedings were begun before the Public Service Commissions of South Dakota, Minnesota, Iowa and Wisconsin seeking authority either to close nearly all the one-man stations or to have one agent serve two, three or four stations. Similar proceedings in other states may be expected momentarily.

"In the public interest, as well as in the interest of our members and the organization as a whole, we have done everything possible to resist this program. Through reliance on the provisions of our Agreements, through informing the residents of the affected communities as to the consequences of the railroad's actions and through attendance at all the hearings of the various commissions and the presentation of evidence and argument, we have tried to make reason, common sense and humanity prevail. Since last November practically all of the time of your General Chairmen and four Vice Presidents as well as much of the time of a number of our Local Chairmen and our General Counsel and of our President has been devoted to these efforts.

*"However, it became evident at an early date that to meet this onslaught effectively would require strengthening of our Agreements. . . . We must prevent a continuance of such a program.*

"While we hope the commissions in other states

will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota \* \* \*

On August 11, 1958, the Iowa Commission issued its order putting into effect the Central Agency Plan (R. 216-246). One week later, on August 18, 1958, ORT issued a Strike Call to its members for 6 A. M. on August 21, 1958 (R. 60-67). The Strike Call, under a heading of "The Issues," referred to the Strike Ballot circular of July 10 and further stated (R. 60-61):

"In the circular we summarized the circumstances giving rise to the urgent need for such a rule. We pointed out the general onslaught of this Carrier on the employment of the people we represent, and particularly the system-wide, wholesale elimination of agency positions and enlargement of assignments of the remaining agents. We recited the brutal conduct of the Carrier in South Dakota in abolishing 53 positions and enlarging the assignments of 16 others, all in one day, before we even had notice of the Order of the South Dakota Commission under which the Carrier purported to act.\* We also told you of our strenuous, patient, but futile efforts to correct the situation under the Railway Labor Act and in the Courts.

*"The need for the proposed rule has again been tragically demonstrated in the last few days. What happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged.*

*"The vote on the strike ballot was almost unanimous in favor of a strike. The time has come to act in accordance with that vote."*

North Western was not informed of the threatened strike until August 14, 1958, when it received notice of the strike from the National Mediation Board (R. 94). The Board

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\* North Western fully observed the termination notice provisions of the ORT agreements (R. 93).

proffered its mediation services in the dispute and this was accepted by both parties, with the case being docketed as E175 (R. 98-99).

The mediator, Wallace Rupp, came to North Western on August 19 at 2:30 P. M. and discussed the matter with Mr. Van Patten (R. 98, 157-158). Mr. Rupp asked Mr. Van Patten if there was any field he knew which might form a basis for settlement of the dispute. Mr. Van Patten said that, without prejudice to his position regarding the illegality of the demand, he thought there was a possibility of settling the entire question involving the proposed rule on the railroad by working out an arrangement for limiting the number of layoffs per year to an agreed percentage of the total number of jobs of the ORT, over and above the reduction in the number of such employees by attrition (R. 157-158, 111).

Mr. Rupp thought for a minute and said, "You have planted a seed and given me something to talk to the Organization about." Mr. Van Patten cautioned Mr. Rupp that he was not making a formal proposal, although he did give him every reason to believe that he was willing to undertake negotiations along that line. Mr. Rupp stated that it was certainly not the time for formal offers to be made by either party, but it gave him a thought and something to talk to the ORT representatives about. Mr. Rupp said he was going to talk to them immediately at the Congress Hotel, and if they were interested he would call Mr. Van Patten the following morning. He did not call (R. 158).<sup>1</sup>

1. Mr. Leighty confirmed that Mr. Rupp did come immediately to the hotel (R. 143). Mr. Leighty's testimony was that "there was considerable discussion," and that "I cannot recall everything that was said." He did testify flatly that Mr. Rupp had said that North Western had nothing to offer (R. 143). His testimony as to whether the mediator had any suggestions was couched in terms of "I do not recollect" and "I do not remember," although he finally said he thought he would have remembered any such suggestion if made (R. 143-44).

On August 20, 1958, the National Mediation Board closed its file in Docket E175, stating that it continued to stand ready to make its services available in case either party desired further mediation efforts (R. 68). The ORT did not reply to this wire but North Western wired back that it was ready to cooperate with the Board at all times (R. 99).

**(e) Effect of Proposed Contract.**

Mr. Leighty testified that the requested contractual provision would mean that North Western could not abolish the position of an agent at a one-man station agency without the permission of the union (R. 147). By custom and practice in the railroad industry, contracts are perpetual and can be changed only by mutual consent (R. 159).

The experience of North Western with ORT, under contracts less rigorous than the one proposed, has been such that it could not safely assume that ORT would agree to the abolition of agency positions (R. 163-164). North Western could not make certain modernization improvements in the future and could not have made them in the past under a contract provision of the kind proposed by ORT (R. 161), which provision is available to all other crafts if it is proper for the ORT. These include its completed or continuing programs in the form of the dieselization of all operations; the consolidation of 14 scattered and obsolete repair facilities into one new modern shop at Clinton, Iowa; improvement of highway grade crossing protection; and the mechanization of maintenance of way procedures. It would block its plans for the future in respect of such matters as electronic yard operations and the installation of centralized traffic control. These necessary modernization programs can be accomplished only through the generation of additional capital by company

savings, and contracts of the kind proposed by ORT would preclude any such savings for all time (R. 161).

North Western cannot accept the contract for which ORT is contending and carry out the orders of the South Dakota and Iowa Commissions, or line abandonment orders of the Interstate Commerce Commission (R. 118-9).

## **2. North Western's Efforts to Bargain With ORT.**

There appears above an account of North Western's efforts, in the course of the emergency mediation, to initiate discussions of a plan for reducing the number of agency positions in accordance with a fixed annual percentage, including an attrition factor, and of the failure of that effort. This was not the first time, however, that North Western had signified a readiness to confer with the ORT for the purpose of trying to effectuate the Central Agency Plan by agreement. On May 26, 1958—approximately two weeks after the South Dakota Commission had issued its order and while the first mediation was still in progress—Mr. Heineman, Chairman and Chief Executive Officer of the North Western, asked Mr. Leighty to meet with him during a recess of one of the hearings at Madison, Wisconsin (R. 76-77, 135-6). Mr. Heineman said, "George, do you think there is any possibility of our sitting down and working out these station closing matters and the discontinuance of these station agents either on a South Dakota or a system basis?" Mr. Leighty turned to Mr. Schoene, his general counsel, and said, "Well, what do you think, Lester?" Mr. Schoene said, "I think we are too far apart." Mr. Heineman then said, "Well, that is up to you gentlemen, but I want you to know that my door is always open." No response was made by the ORT to this invitation (R. 77). Indeed, Mr. Leighty did not even tell his representative in the then current mediation proceedings, Mr. Kinkead, about this incident (R. 154).

Mr. Heineman testified without challenge that his purpose in making this approach was to indicate a willingness to discuss with the ORT some means of cushioning the economic impact of abolition of positions, it being his opinion that the railroad has always had a responsibility in that regard, and that the approach itself was "an offer to bargain on the realities underlying the (ORT's) proposal, and was designed "to draw out further negotiations" (R. 105-6).

Not long after the new management took control of the North Western, and as an adjunct to the steps it was taking to reduce costs through reorganization and modernization programs, it proposed severance pay protection over and above that provided by the Railroad Unemployment Insurance Act (R. 102-3). On December 27, 1956 it entered into the first Supplemental Unemployment Benefits Agreement in railroad history with substantially all of the non-operating unions other than the ORT (R. 303-312). The ORT, although offered participation in this Agreement, chose not to do so at the time it first became effective (R. 103). It was again offered the ORT in the fall of 1957 (R. 103-4); and during the controversy over the threatened strike North Western made it clear that it would extend the identical terms of the Agreement to the ORT on a retroactive basis to the same date set out in the ORT's demand (R. 104).

The ORT did not choose to accept that offer or even to discuss it. Mr. Leighty testified that he knew the dispute could be settled by his acceptance of the SUB Agreement on this or some comparable basis (R. 147-48). Although he stated his opinion to be that the Agreement was inadequate, he neither made any proposals for alterations of its terms nor indicated any interest in discussing the matter. The ORT's response to all of these efforts on the part of

North Western to interest it in some provision for cushioning the impact of unemployment or of reducing the rate at which unemployment would result from the Central Agency Plan has been simply to insist upon its proposed veto power over discontinuance of any positions (R. 148).

The last sentence of the District Court's Finding No. 17 (R. 357) is: "Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads." North Western challenges this as unsupported by the record.<sup>1</sup> The ORT tried to supply such evidence, but the results of this effort were (1) the inclusion in the record of two agreements between the Railroad Yardmasters, on the one hand, and Chicago Great Western Railway Company and Missouri-Kansas-Texas Lines, respectively, on the other (R. 346-9); and (2) testimony by Mr. Leighty as to a shop crafts agreement of the Seaboard Air Line (R. 138). The first two such agreements are identical in terms, and show on their faces that the employment maintenance provisions were to last less than two years. Although the Seaboard agreement was not offered in evidence so that its complete terms could be examined, Mr. Leighty's own testimony showed that it guaranteed an agreed level of employment only from year to year. None of these agreements involved a veto power in perpetuity over the discontinuance of positions, or were directed against the effectuation of regulatory orders.

The ORT has sought to repair these deficiencies in the record by a 60-page appendix to its brief referring for the first time to a mass of material not of record. Extraordinary as this is in terms of the orderly resolution of a lawsuit, it is significant that not even by this means has

1. This is the only one of the District Court's true findings of fact, as distinguished from conclusions which were intruded under this heading, which North Western finds it necessary to attack.

the ORT come up with a clear showing of a contract provision in any industry identical in scope with the ORT's demand in this case. The District Court's finding, even with massive assistance from outside the record, is still without foundation.

A large part of the ORT's lengthy excursion beyond the courtroom—free of the dusty baggage of cross-examination, authentication, and similar inconveniences encrusted upon the judicial process—is devoted to the merits of severance pay and supplemental unemployment benefit plans, and the elements of strength they contribute to the process of private collective bargaining.<sup>1</sup> What appears of record with respect to North Western's SUB Agreement and its efforts to interest the ORT in this or some other severance pay arrangement, demonstrates North Western's adherence to these views. But what of the ORT? The record shows that it did not choose to bargain about these matters with North Western; and the official proceedings of Congress reveal that, in the ORT's view, they are not

1. The table in the Appendix (pp. 57-63) is a good illustration of the vices of going outside the record. It is captioned "Instances Where a Carrier Asserted That Subject of Employees' Notice was not Bargainable Under the Railway Labor Act." The limited survey which has proved possible indicates an erroneous characterization in many instances. Thus, far from involving uniform and exclusive assertions by the carrier of non-bargainability as to "rates of pay, rules, and working conditions", many of the so-called notices involve these entirely separate issues, in some cases raised by the unions: (1) the propriety of the notice under existing moratorium provisions, (2) the relationship to Section 6 of cancellation clauses contained in existing agreements, (3) minor disputes involving the general issue of changes effected without prior Section 6 notice, or (4) the proper organization to submit a particular demand. In certain other instances no issue of bargainability of any kind was raised, while in other situations where the issue of bargainability was reserved, a settlement was nevertheless reached. Thus, these items have not only been improperly injected into these proceedings for the first time before this Court, but they offer no support for the ORT's suggestion that the issue of bargainability under the Railway Labor Act will inevitably arise to impose an undue burden on the federal courts.

desirable subjects for bargaining with any railroad employer.

Mr. Schoene was a witness in support of Senate Bill 226, 86th Congress, 1st Session, proposing increases in the benefits provided by Railroad Retirement and Unemployment Compensation. During his appearance on February 10, 1959 before a subcommittee of the Senate Committee on Labor and Public Welfare, this colloquy took place between himself and Senator Clark, of Pennsylvania:

"Senator Clark. I assume that your reason for asking this direct legislative increase in the unemployment compensation payments for railroad employees is because you feel you would not be successful in collective bargaining and have not been successful in collective bargaining in the past with the railroads as the steelworkers and auto-workers union have been with their respective industries, because of the present financial difficulties in which the railroads find themselves.

"Is that correct?

"Mr. Schoene. No; I do not think that that is quite correct, Senator Clark. We have not tried to bargain with the railroads on the subject of supplemental unemployment insurance.

"Senator Clark. Then why do you want to take a different tack from the auto-workers and the steelworkers?

"Mr. Schoene. It is our view that unemployment insurance should be dealt with in its entirety by legislation. I think that the auto-workers and the steelworkers were driven to supplementation by collective bargaining because they could not get legislative action in the States sufficiently, generally in the States, to take care of their needs.

"My own personal feeling is that it would be preferable generally to take care of unemployment insurance by legislation. We feel that having a nationwide system for the railroad industry alone, we can properly make our recommendations to Congress on that sub-

ject, rather than to have a structure which consists partly of legislation and partly of supplementation through collective bargaining."

In other words, never bargain with a private employer if you can bargain with Congress. When the District Court found as a fact from the evidence of record, as it did (Finding No. 20, R. 357), that "(North Western) did show willingness to negotiate upon the central agency plan, including a possibility concerning severance pay," it could not have known how completely uninterested the ORT was in such a negotiation.

Mr. Leighty summed it all up when, after the District Judge had intervened in the questioning to get a clear answer as to whether the ORT had ever evinced any sign of being willing to discuss a modification of its demand, he stated on the record that "*\* \* \* the only alternative which up to the present I have offered the North Western Railroad was to comply with this rule or strike.*" (R. 148.)

### **3. Submission to National Railroad Adjustment Board.**

Nowhere in the ORT's statement is there any reference to the facts which provide an independent basis for the injunctive relief directed by the Court of Appeals. On August 21, 1958 North Western formally advised the ORT that its proposed contract demand was barred by the moratorium provisions of the National Agreement of November 1, 1956 (R. 100) and the following day North Western submitted this issue to the National Railroad Adjustment Board (R. 247-300).

Article VI of the National Agreement provided that during its life (to October 31, 1959) the parties would not serve any contract demand for various purposes, including the establishment of compensation for time paid for but not worked (R. 268-9). Although there was a general exception

for proposals relating to "stabilization of employment," Special Board of Adjustment No. 215 had found that proposals for payments for time not worked do not fall within the meaning of this exception (R. 287ff.). The National Mediation Board has consistently held that disputes involving the interpretation or application of executed mediation agreements are to be resolved by the National Railroad Adjustment Board (R. 162-163). North Western accordingly submitted this dispute, as a matter involving the interpretation or application of an existing agreement, to the latter agency on August 22, 1958, where the matter is pending for decision.

### **QUESTIONS PRESENTED.**

1. Did Congress intend that the interruption of interstate commerce incident to a railroad strike can be founded upon a contract demand that no position in being on a date antecedent to the demand be discontinued without the union's consent, where the purpose and effect of such demand is to prohibit the carrier's compliance with state commission orders in a sector of interstate commerce left by Congress to state regulation in the interest of economical and efficient transportation service to the public?

2. May a labor organization lawfully strike to enforce a demand, the propriety of which under the moratorium clause of an existing labor agreement presents a substantial question as to the application or interpretation of that agreement, thereby involving a "minor dispute" which has itself been duly submitted to, and is pending before, the National Railroad Adjustment Board?

### SUMMARY OF ARGUMENT.

The Norris-LaGuardia Act does not automatically dispose of the propriety of injunctive relief in this case. That Act is one expression of Congressional policy. Where the facts of a particular case bring other Congressional policies into play, it is the function of this Court to determine which of such policies Congress intended to be dominant, and to accommodate these policies so as to give effect to that intention. In making such accommodations this Court has not considered itself bound at all events to accord Norris-LaGuardia the position of primacy.

Congress has affirmatively declared the national interest in economical and efficient rail transportation in interstate commerce. It has given concrete expression to that interest not only by providing in the Railway Labor Act a framework for the conduct of labor relations so as to minimize strikes, but also by consciously shaping the Interstate Commerce Act so as to vest certain regulatory powers in the Interstate Commerce Commission and to leave for the time being the regulation of certain other aspects of interstate commerce to the states. This last in itself is an expression of Congressional policy. In the case of station agencies, the legislative record shows this policy to have been arrived at with full appreciation of the important effects upon the national interest, but with a deliberate decision to leave this regulatory job to the states because it is being adequately, and in Congress' judgment most suitably, performed at the local level.

The record in this case shows a calculated purpose in the ORT to use the processes of the Railway Labor Act to frustrate the regulatory decisions of four states with respect to the Central Agency Plan. The impact of this effort is, thus, upon Congressional, as well as state, policy.

Congress did not intend that the national interest in the economic, efficient and uninterrupted flow of interstate commerce should be subverted by a strike founded upon a contract demand having the purpose and the effect of the one advanced by the ORT in the factual setting of this record. The relevant federal policies are to be accommodated accordingly.

To do so does not imperil legitimate collective bargaining in the railroad industry; or expose the federal courts to the dangers of being indiscriminately called upon to sit in judgment upon all contract demands; or take us back to pre-Norris-LaGuardia abuses. A judgment of affirmance would mean—and only mean—that the demand served by the ORT on the North Western on December 23, 1957, cannot provide the basis of a strike aimed at preventing North Western from complying with the regulatory orders of four public agencies exercising powers over interstate commerce left to them by Congress in aid of a national policy.

The record shows no refusal by North Western to confer or bargain about the Central Agency Plan. It shows rather, and the District Court found as a fact, repeated and serious efforts to do so, uniformly rejected by the ORT. North Western's only refusal was to recognize or participate in an exercise of bargaining power beyond the contemplation of Congress because it was inimical to Congressional policy. Had it not so refused, this record shows that the fate of the Central Agency Plan would have depended upon North Western's ability to survive a strike, and not upon the merits of the Plan as found by four state commissions. Congress did not intend to substitute economic warfare for regulation in this area of interstate commerce—to submit issues of this kind for determination by ordeal of battle rather than by the public authority provided for this purpose.

The injunctive relief directed by the Court of Appeals is proper by reference to an independent ground asserted by North Western. These parties had by contract imposed limitations upon themselves with respect to the making of certain kinds of demands during the period from November 1, 1956 to October 31, 1959. North Western claimed that the demand in issue fell within this ban. That presented a question as to the interpretation or application of an existing agreement; and North Western submitted that issue to the National Railroad Adjustment Board, where it is pending for decision. Under the Railway Labor Act as heretofore construed by this Court, North Western was entitled to an injunction against a strike founded upon that demand.

The District Court had jurisdiction to resolve North Western's claim, founded as it was upon rights assertedly accruing to it under federal statutes relating to interstate commerce. Whatever the merits of that claim may ultimately be found to be, it was no insubstantial or frivolous claim of federal rights; and there was jurisdiction, without reference to diversity, to hear and determine it.

The District Court's orders granting injunctive relief are moot in the present posture of this case. The questions raised about them were not "decided" by the Court of Appeals, within the meaning of Rule 19 of this Court relating to its certiorari jurisdiction. In any event, those orders were proper. In granting a permanent injunction on the merits to September 19, 1958, the District Court correctly construed the waiting period requirements of the Railway Labor Act; and, in entering an injunction pending appeal, the District Court properly exercised a discretion explicitly vested in it by Rule 62(c) of the Federal Rules of Civil Procedure.

## ARGUMENT.

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### I.

#### **A CONFLICT BETWEEN THE NORRIS-LA GUARDIA ACT AND OTHER FEDERAL STATUTES REQUIRES A JUDI- CIAL ACCOMMODATION.**

In ascribing an unyielding primacy to the Norris-LaGuardia Act, both the ORT and the RLEA obscure the direct conflict between the private power sought by the ORT and the effective operation of public regulatory authority. The effort by the ORT to subject public regulation to a private veto cannot be meaningfully considered without reference to basic economic policies reflected in the Congressionally formulated pattern of federal-state railroad regulation. This need for accommodating Norris-LaGuardia to other aspects of Congressional policy is not presented here as a matter of first impression. It is a subject to which both labor and management have hitherto been introduced by this Court.

In its initial effort to reconcile the statutory purposes of the Railway Labor Act with the literal terms of Norris-LaGuardia (in that case over the objections of a reluctant management), this Court held that the provisions of Norris-LaGuardia were applicable only insofar as they created no conflict with the dominant requirements of another statute. *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 563 (1937).

Twenty years later it was a labor organization which claimed that Norris-LaGuardia provided a bar against the grant of federal injunctive relief "to vindicate the processes of the Railway Labor Act." *Brotherhood of Rail-*

*road Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U. S. 30 (1957). That case, arising from those provisions of the Railway Labor Act relating to minor disputes, is of general significance to the problem of reconciling the literal anti-injunction provisions of Norris-LaGuardia with the statutory scheme and purposes of the Railway Labor Act. In withdrawing the *Chicago River* strike from the limitations of Norris-LaGuardia, the Court observed (353 U. S. at p. 40):

"We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

The Norris-LaGuardia Act does not provide a unique example of the need for adjusting legal instrumentalities fashioned for the protection of legitimate labor activity to other aspects of public policy. In *Thornhill v. Alabama*, 310 U. S. 88 (1940), this Court extended the broad protection of the Fourteenth Amendment (construed as embodying the free speech guarantee of the First) against a state statute which sought to declare peaceful picketing illegal.

The doctrine of *Thornhill* was propounded under circumstances in which the picketing had not been shown to be a coercive device directed towards the negation or frustration of other formulations of public policy. Its qualification began with *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949), in which the protection of the Federal Constitution from the injunctive powers of a state court was held not to extend to peaceful picketing avowedly directed to coercing conduct in violation of a

state anti-trade-restraint statute.<sup>1</sup> The Court said (336 U. S. at pp. 497-8, 503):

"It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgement of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill v. Alabama*, 310 U. S. 88, 102, and *Allen Bradley Co. v. Union*, 325 U. S. 797, 807, note 12: *But the record here does not permit this publicizing to be treated in isolation.* For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to non-union peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law:

"And it is clear that appellants were doing more than exercising a right of free speech or press. *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 776-777. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade."

*Giboney* involved economic coercion directed against compliance with the public policy of the state embodied in

1. For a more detailed analysis of the *Thornhill* case and its subsequent accommodations to other aspects of public policy, see Gregory, *Labor and the Law* (2nd Rev. Ed., 1958), Chap. XI, which deals with the cases discussed here. The history of *Thornhill* is set forth in this brief as illustrative of a process of judicial accommodation, and not because its references to state policy are asserted to be controlling on the issues of Congressional intent presented by this case.

a specific statute. In *Building Service Employees, Local 262 v. Gazzam*, 339 U. S. 532 (1950), a further qualification was made with reference to a general legislative declaration of public policy, as construed by the state's highest court, against the use of coercion by employers (involuntary in this case) in the designation of collective bargaining representatives by employees; and in *Hughes v. Superior Court*, 339 U. S. 460 (1950), this Court held it to be immaterial that the public policy against which the picketing was directed had been declared by state courts rather than by legislative enactment. As in *Giboney*, the activity which the picketing sought to coerce in *Gazzam* and *Hughes* would have constituted an illegal violation of public policy and the rights of third persons which that policy sought to protect. *International Brotherhood of Teamsters, Local 309 v. Hanke*, 339 U. S. 470 (1950), dealt with the related, but distinct, problem of picketing intended to coerce activity which, while not constituting an illegal violation of the rights of any third persons, was contrary to a state policy in furtherance of the general public interest thought to exist in self-employment.

The judicial accommodation of the *Thornhill* doctrine to competing considerations of public policy is not unlike the reconciliation which this Court has sought to effect between the policies of Norris-LaGuardia and of coordinate Congressional enactments. Thus, in dealing with the diverse purposes of the Norris-LaGuardia, Sherman and Clayton Acts, this Court, in a manner reminiscent of its pronouncements in the constitutional area of *Thornhill*, expressed itself in the following terms in *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797 (1945) (at p. 806):

"The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a

competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other."

This process of reconciliation inevitably involves more than a simple comparison of the literal provisions of the conflicting statutes. "In short, there is no rule of thumb for accommodating conflicting statutes. The plain language of the Norris-LaGuardia Act is generally violated if a labor injunction is issued, whereas, if it is withheld, the other statute is not usually literally violated, although its purpose may be defeated." Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958). But the absence of a rule of thumb has not proved an insurmountable barrier to the accommodation of the literal provisions of Norris-LaGuardia to Congressional purposes embodied in the Railway Labor Act and other federal statutes concerned with interstate commerce in rail transportation.

## II.

### **WHERE THE AIMS OF ECONOMIC COERCION ARE CONTRARY TO OTHER POLICIES INTENDED BY CONGRESS TO BE DOMINANT, NORRIS-LA GUARDIA IS INAPPLICABLE.**

This Court has considered the efforts of certain railway labor organizations to seek in Norris-LaGuardia a sanctuary from injunctive interference for racially discriminatory practices. These acts of discrimination violated no specific provisions of the Railway Labor Act. Thus, the determination of Congressional intent as the basis for an appropriate accommodation was derived from implied purposes rather than from express mandates.

In *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), without reference to any express duties imposed on bargaining agents by the terms of the Railway Labor Act, the Court said (at p. 199):

*"But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of the craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."*

The Court further stated (at pp. 202-203):

*"We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."*

Similarly, in *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944), the Court, notwithstanding the absence of any express statutory requirements or limitations, said (at p. 213):

*"We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct."*

The *Steele* and *Tunstall* cases did not raise the precise issue of possible limitations imposed by Norris-LaGuardia on the capacity of the federal courts to effectuate by injunction Congressional intent inferred from the policies and purposes of the Railway Labor Act. That issue was squarely raised for the first time in *Graham v. Brother-*

*hood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949).

In an effort to remove the *Graham* case from the lengthening shadow of *Virginian Railway*, the labor organization suggested that, while the earlier case involved no labor dispute within the meaning of *Norris-LaGuardia*, the existence of such labor dispute in *Graham* provided immunity against federal injunctive relief. This Court rejected any idea that *Virginian Railway* was predicated on the absence of a labor dispute within the meaning of *Norris-LaGuardia* (338 U. S. at pp. 237-8). Notwithstanding its belief that a labor dispute was at the core of the *Graham* case, this Court, in holding *Norris-LaGuardia* inapplicable, observed (338 U. S. at p. 240):

“ \* \* \* there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If, in spite of the *Virginian*, *Steele* and *Tunstall* cases, *supra*, there remains any illusion that under the *Norris-LaGuardia* Act the federal courts are powerless to enforce these rights, we dispel it now. \* \* \* ”

*Steele*, *Tunstall* and *Graham* involved the accommodation of (1) the implied statutory duty of a bargaining agent under the Railway Labor Act to represent without unfair discrimination all members of the class for which it acted, and (2) the literal provisions of *Norris-LaGuardia*. In *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952), this Court significantly expanded the scope of the policy considerations by which the validity of collective bargaining demands under the Railway Labor Act must be judged. In considering a new problem of a discriminatory labor agreement entered into by the railroad at the demand of a union which was not the bargaining agent of the

Negro workers, the Court found in the policy underlying the Railway Labor Act a prohibition under any circumstances of the use by bargaining agents of "their position and power to destroy colored workers' jobs in order to bestow them on white workers."

The *Howard* case has apparently been misread by the RLEA. Lumping it with *Graham, Steele and Tunstall*, the RLEA states in its brief (p. 30):

"The cited cases did not limit the subject-matter of collective bargaining under the Railway Labor Act. Instead, they hold in substance that, *whatever the subject-matter of the bargaining may be, the duly certified representatives of the employees must use its bargaining authority so as not to improperly discriminate against parts of the craft or class represented.* The particular discrimination involved in the cited cases related to race. The cases obviously have nothing to do with the question of whether the Railway Labor Act limits the subject-matter of collective bargaining."

Contrarily, the *Howard* case, which did not involve discrimination "against parts of the class or craft represented," clearly establishes racial discrimination generally as an improper subject matter of collective bargaining; and it establishes the principle, wholly apart from the obligations of the duly constituted bargaining agent to the members of the class it represents, that there are certain demands which this Court can find to be wholly outside the range of Congressional authorization.<sup>1</sup> No less does it

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1. In addition to grouping *Howard* improperly with the other cases, the ORT and the RLEA try to turn them all aside by vague references to the inherent immorality, and consequent "illegality," of racial discrimination. In *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955), cert. den. 350 U. S. 967, a white employee sought an injunction against bargaining by his union and the railroad about a contract proposal affecting his seniority rights. There being no diversity, the district court dismissed the complaint as presenting no federal ques-

establish that in appropriate circumstances the literal provisions of Norris-LaGuardia do not operate to bar the federal courts from enjoining strikes founded upon the misuse of collective bargaining rights under the Railway Labor Act.

The thrust of these precedents cannot be ignored, and, indeed, the ORT recognizes that the process of accommodation has rendered Norris-LaGuardia inapplicable "in three situations involving railway labor," ORT initially characterizes these situations as relating to (1) minor disputes, (2) illegal activities, and (3) compliance with the positive mandates of the Railway Labor Act (ORT Brief, pp. 21-22). With further precision the ORT also appears to recognize that the existence of "illegality" has been held to derive, not from collective bargaining agreements which violate express statutory requirements, but rather from agreements "inconsistent with the *policy* of the Railway Labor Act" (ORT Brief, p. 25). Nevertheless, both the ORT and the RLEA seek to avoid the necessity for dealing with the policy considerations invoked by the demand in these proceedings by their basic contention that the existence of a "labor dispute" within the meaning of Norris-LaGuardia obviates the need for any such inquiry (ORT Brief, pp. 19-44; RLEA Brief, pp. 45-52).

In achieving an appropriate accommodation between Norris-LaGuardia and other aspects of public policy, the Courts of Appeals and this Court have perhaps differed in their terminology, although not in result. In the opinion below, the Court of Appeals, in apparent reliance on *Brotherhood of Railroad Trainmen v. New York Central*

tion. The Sixth Circuit reversed, noting that, although no racial discrimination was involved, the dispute, as in *Howard*, raised the issue of the validity under the Railway Labor Act of a proposed contract, and that the employees were, as this Court there held, entitled to "look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the (Railway Labor) Act."

*Railroad Co.*, 246 F. 2d 114 (6th Cir. 1957), cert. den. 355 U. S. 877 (1958), expressed its view that the present proceedings did not involve a labor dispute.

The *New York Central* case involved a protest strike directed against the closing of a railroad yard—an act which engendered no major dispute because no changes in the provisions of existing contracts were involved, and no minor dispute because of the absence of any suggestion that the action was in violation of existing agreements.<sup>1</sup> In holding *Norris-LaGuardia* inapplicable to the circumstances before it, the Sixth Circuit said (246 F. 2d at p. 122):

“In this case, in our view, no labor dispute exists. A strike would interfere with appellee as a common carrier of interstate commerce, in the discharge of its duties which are imposed by federal law. The district court had jurisdiction over the subject-matter of the suit. A railroad strike involving a controversy which does not constitute a labor dispute, may be, and properly is, enjoined upon a showing that it will interfere with interstate commerce and result in irreparable injury to the public and to the railroad.”

This Court, in its treatment of collective bargaining agreements contrary to the policies of the Railway Labor Act, has not deemed it necessary to sustain the injunctive powers of the federal courts on the basis of an absence of a “labor dispute” within the meaning of *Norris-LaGuardia*. Where “the activity enjoined was outlawed by federal law and policy” (ORT Brief, pp. 24-5), *Norris-*

1. The RLEA has also misread the *New York Central* case on the question of the presence of a minor dispute bringing it within the doctrine of *Chicago River* (RLEA Brief, pp. 51-2). RLEA asserts that the railroad brotherhoods “were contending that the proposed action of the carrier in closing the yards violated existing contracts.” With reference to the protest strike before it, the *New York Central* court stated (246 F. 2d at p. 118): “Here we are confronted by neither a major nor a minor dispute, within the meaning of the Railway Labor Act, \* \* \*”

LaGuardia has been held inapplicable, and the question of the presence of a "labor dispute" within the meaning of Norris-LaGuardia has been rendered irrelevant. *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 237-8 (1949).

The ORT correctly observes that the present case was tried on the theory that Norris-LaGuardia is inapplicable to the strike against which relief was sought (ORT Brief, p. 46).<sup>1</sup> To this it might be added that the inapplicability of Norris-LaGuardia is predicated on the unlawfulness of the ORT's demand which subverts the operation of public regulatory authority and which is therefore contrary to Congressional purposes and policies. With reference to this crucial issue, the essence of the holding below is that the effort to subject the implementation of public regulatory orders to a private veto is outside the scope of Congressional authorization, and a strike to enforce this objective is, accordingly, enjoined.

The suggestion by the court below of the absence of a "labor dispute," while consistent in language with the treatment of this issue in *New York Central*, is not an essential element of its holding concerning the impropriety of the demand. That comment, however, has been used to divert attention from the actual genesis and aim of the ORT's demand in this case. In place of such discussion, there has been substituted an extended commentary by both the ORT and the RLEA regarding the presence of a "labor dispute" in these proceedings, even if the impropriety of the demand be assumed. Given a purpose and effect contrary to the procedures or policies of the Railway Labor Act, this point is no more dispositive of the

1. If Norris-LaGuardia is inapplicable because of the impropriety of the ORT's demand, the ORT's arguments based upon Sections 7 and 8 of that Act are irrelevant. In any event, the good faith bargaining efforts contemplated by Section 8 have been more than met by North Western on this record.

ultimate issue in this case than it proved to be in *Virginian Railway, Steele, Tunstall, Graham, Howard and Chicago River*.

### III.

#### **THE ORT'S DEMAND HAS THE PURPOSE AND EFFECT OF CREATING A PRIVATE VETO POWER OVER PUBLIC REGULATORY AUTHORITY.**

The ORT displays an understandable sensitivity to the characterization of its demand as calling for a "veto" power (ORT Brief, pp. 41-2), although the word "veto" is one which the RLEA does not find inapposite (RLEA Brief, p. 37). This characterization does not seem extravagant in the light of Mr. Leighty's testimony that its effect would be "that the railway could not abolish the position of an agent at a one-man station agency, without the agreement or permission of the union" (R. 147).

The avowed object for which this power is sought is the frustration of the regulatory orders of the four state commissions which have approved the Central Agency Plan. It was this displacement of public regulatory authority by private veto which the Court of Appeals found offensive to Congressional policy; and its concern on this score clearly emerges from its opinion. Thus, the court recites these facts (R. 378-9):

"North Western filed petitions for authority to effectuate the Central Agency Plan with the public utilities commissions of South Dakota, Iowa, Minnesota and Wisconsin. In South Dakota, the Public Utilities Commission held hearings at various points throughout the State over a period of about two months. The Union appeared in the proceedings to protest the granting of the authority sought; presented evidence, participated in filing briefs with, and in oral argument before, the Commission. . . .

"In the Commission proceedings, the Union took

the position that the Central Agency Plan could not be put into effect without agreement of the Union under the existing collective bargaining contracts. However, a few weeks after North Western filed its first petition in South Dakota, the Union sent North Western letters under Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 151, *et seq.*) requesting that the existing collective bargaining agreements be amended by adding the following provision:

'No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization.' "

The court also attached importance to the purpose, showing on the face of the ORT strike circular and call, of anticipating and rendering ineffective the regulatory orders (R. 380-1).

With reference to these unique facts as they had developed between this union and this railroad, the Court of Appeals made these additional statements leading inexorably to its ultimate holding (R. 382):

"Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. The Union is thus attempting to attain, through the collective bargaining processes of the Railway Labor Act, that which would prohibit North Western from complying with the orders of the South Dakota Public Utilities Commission and the Iowa State Commerce Commission.

"This contract proposal, if accepted, would enable the Union to control the pace of North Western's compliance with the Commission orders aforesaid. (R. 383.)

"A carrier may not escape its obligations by bargaining them away. The Commission orders may not be circumvented by a contract entered into by a carrier and a union under threat of strike." (R. 384.)

The court thereupon stated its conclusion in these terms (R. 385):

"We, therefore, hold that such a demand as here made by the Union is completely outside the ambit of 'rates of pay, rules and working conditions', as those words are used in the Railway Labor Act, *In re Chicago North Shore and M. R. Co.*, 7 Cir. 1945, 147 F. 2d 723, 727, cert. den. 325 U. S. 852, and hence is not within the scope of mandatory bargaining. *Therefore, the terms of the Norris-LaGuardia Act are here inapplicable.*"

If there is to be read into the Railway Labor Act a Congressional purpose to permit its collective bargaining procedures to be used to acquire the power to prevent the effectuation of public regulatory orders, then it will be open to each labor organization to seek for itself the unique form of job security which such power confers. The ORT's demand does not seek to secure financial benefits for the employee who, through the operation of seniority, is displaced or otherwise affected by the discontinuance of a position. Indeed, North Western's efforts to negotiate such protections were spurned. The ORT's demand is for nothing less than permanent control over the position itself, however much the public interest may call for its elimination in the view of federal or state regulatory agencies.

This basic distinction may be obscured, but cannot be obliterated, in the abstract discussions by the ORT of "stabilization of employment" or "job security," and by the RLEA concerning "rates of pay, rules or working conditions" (ORT Brief, pp. 26-33), and ORT Appendix; RLEA Brief, pp. 33-45). Thus, in the case of a branch line abandonment authorized by the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act (49 U. S. C. Sec. 1(18)), the ORT seeks power to compel the maintenance of each station agency position notwithstanding the authorized abandonment. But a branch

line abandonment may affect other organizations to no less degree. If the ORT is successful here, may not the effort to acquire similar power be made by such other organizations?

The ORT seeks to diffuse the impression that its demand—notwithstanding its unique origin and purpose—is essentially one indistinguishable aspect of a vast area of collective bargaining directed toward stabilization of employment and job security. If these misty concepts are the sole standards to be applied in determining the legality of collective bargaining proposals, then the racial discrimination cases should, in the view of the ORT, be re-examined. Undoubtedly the objective of the white brakemen in the *Howard* case to secure more jobs for themselves through the displacement of Negro porters can readily be rationalized as one phase of the continuing quest for job security and employment stabilization. It is in this respect that the court below found “no material difference” between the overriding significance claimed for these concepts by the ORT and their presence in the *Howard* case (R. 384). The inquiry into the propriety of a particular proposal is not foreclosed simply because the demand would contribute to job security.

#### IV.

#### **THE ORT'S DEMAND IS BEYOND THE RANGE OF CONGRESSIONAL CONTEMPLATION AS THE BASIS OF A LAWFUL STRIKE.**

##### **A. The ORT's Demand Is Contrary to Policies Embodied in the Pattern of Federal-State Regulation Fashioned by Congress to Further the Public Interest in an Efficient and Economical Transportation System.**

The ORT and the RLEA correctly observe that the Railway Labor Act provides a unique statutory scheme governing the relations of labor and management (ORT Brief,

p. 36; RLEA Brief, p. 19). It is a uniqueness which derives from the special impact on the public interest of interruptions to interstate rail transportation. Thus, this Court in *California v. Taylor*, 353 U. S. 533 (1957), stated (at p. 566):

"Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes. A primary purpose of this machinery of railway government is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein. \* \* \*';"

and in *Virginian Railway* (at p. 552 of 300 U. S.):

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, *especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public*, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge."

Another source of this singularity is the pervasive system of federal-state regulation of significant phases of interstate railroad operations, including the adjustment of station facilities and services to changing transportation requirements. It is for this reason that—on this record—the issue is not one of a conflict between collective bargaining and managerial prerogative. A regulated utility has, at best, little enough of the latter, as witness the fact that North Western had to justify in advance its managerial

decision about the Central Agency Plan to four separate public agencies. The conflict is rather between the ORT's concept of the uses to which collective bargaining (and the resulting strike threat) can be put, on the one hand, and the federal interest in effective regulation by public authority of interstate commerce, on the other.

The relationship of the provisions of the Railway Labor Act to various aspects of this regulation has previously been considered by this Court. In *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943), the Illinois Commerce Commission directed a carrier to make certain arrangements with respect to the supplying of cabooses for the comfort and convenience of the men operating its trains. The carrier attacked this order on the ground that it had already entered into contractual arrangements under the Railway Labor Act with its employees for the supplying of cabooses, and that those arrangements could not be altered except through changes negotiated pursuant to the Railway Labor Act. In other words, the argument was that Congress, in the Railway Labor Act, had pre-empted the field in such manner that the state statute could not validly be brought to bear. This argument was rejected (at pp. 6-7):

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation."

The Court also stated that the federal interest under the Railway Labor Act "is to see that disagreement about conditions does not reach the point of interfering with interstate commerce." Thus, in the *Terminal* case, where the operation of state regulation provided in itself the framework of agreement, the Railway Labor Act was held not to supersede the effectuation of such state authority.

Previously, in *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249 (1931), this Court had affirmed the decision of a three-judge district court (42 F. 2d 765) which had similarly ruled against the carrier's contention that a Missouri full crew law must fall before the pre-emption of the field represented by the Railway Labor Act, inasmuch as matters relating to the number of persons required to operate a train could only be determined by negotiations relating to "working conditions", as those words are used in the Railway Labor Act. This argument failed for the reason stated below by the district court (at p. 773 of 42 F. 2d):

"They ('working conditions' under the Railway Labor Act) mean such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees. This could not include matters of statutory duty, for such are withdrawn from the volition of either party."

The *Terminal Railroad* and *Norwood* cases involved mandatory regulations in the area of health and safety. In *re Chicago, North Shore and Milwaukee R. Co.*, 147 F. 2d 723 (7th Cir. 1945), cert. den. 325 U. S. 852 (1945), involved the approval by a state commission of revisions in inter-corporate operating agreements. The North Shore had entered into a contract with the Chicago Rapid Transit Company whereby the latter undertook to operate the trains of the former within the Chicago city limits. This contract was subject to the approval of the Illinois Commerce Commission under the state statute, and it was

authorized by that agency. The authorization was permissive in form, as is usual in cases arising by carrier initiative rather than by commission action on its own motion. The employees of the North Shore asserted that their contract gave them the right to the work of operating the trains over the segment of the line in question, and they disputed the right of the Rapid Transit employees to take over that work under the new contract. The specific contention of the North Shore employees was that the Railway Labor Act prevented any change in the arrangements without the negotiation of a change in the existing contract under the procedures of the Railway Labor Act. In reliance on this Court's decisions in *Norwood* and *Terminal Railroad*, the Court of Appeals said (at p. 727):

"The Act does not undertake governmental regulation of working conditions. *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6, 63 S. Ct. 420, 87 L. Ed. 571, nor have we been able to find in the Act an intention to exclude a State from exercising its police power or the right to approve or disapprove the terms and conditions upon which one carrier might allow another carrier to use the former's property or facilities.

"The Illinois Public Utility Act contemplates actual supervision of every public utility so that continuous, adequate, uniform satisfactory service shall be rendered to the public, [case cited] and requires that intercorporate contracts providing for the use by one rail carrier of tracks and facilities of another carrier be approved by the Illinois Commerce Commission.

"The phrase 'working conditions' means such conditions affecting the work of the employees as might be the subject of agreement between North Shore and its employees, *Missouri Pac. R. Co. v. Norwood*, D. C., 42 F. 2d 765, 773, affirmed 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010. The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work re-

quired of employees. It does not exclude a State from exercising its police power. *Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen*, *supra*, 318 U. S. 6, 63 S. Ct. 420, 87 L. Ed. 571."

These cases established the existence of areas in which the collective bargaining procedures under the Railway Labor Act were not intended by Congress to displace the effectuation of state regulation—whether falling within the area of health and safety, or the area of economic regulation. Cases involving the relation between (1) the limitations imposed by Norris-LaGuardia, (2) the statutory procedures of the Railway Labor Act, and (3) the general common carrier obligations imposed on railroads under the Interstate Commerce Act have also arisen in the federal courts. Two recent cases have held that where a protest strike involving neither a major nor minor dispute would interfere with the performance of common carrier obligations imposed by federal regulatory law, such strike was properly enjoined in the federal courts notwithstanding the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114 (6th Cir. 1957), cert. den. 355 U. S. 877 (1958); and *Norfolk and Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. den. 355 U. S. 914 (1958).

A comparison of *New York Central* and *Norfolk* with the present case suggests that the ORT, in submitting a formal demand for a veto power over the abolition of positions, was well aware of the problems posed by these earlier cases. As in those cases, the determination to strike arises as a protest against the implementation of managerially initiated change. In *New York Central* and *Norfolk*, the courts, in holding Norris-LaGuardia inapplicable, had noted the absence of a properly processed major dispute. Mindful of the lessons of these cases, the ORT moved

early to acquire the strike weapon to prevent the effectuation of the possibly adverse regulatory orders of four state commissions. The vehicle it used was the prior submission of a demand devised with this specific end in view.

Thus; the controlling issue in this case is whether Congress intended that the interruption to interstate commerce which it sought to avoid by enactment of the Railway Labor Act could be permitted to result from a strike to enforce a collective bargaining demand designed to subject the effectuation of a significant aspect of public regulation to the veto power of a private organization. A consideration of the policies underlying careful Congressional formulation of the present pattern of federal-state regulation demonstrates that Congress could not have intended to permit its public purposes to be set at naught through the artful manipulation of the collective bargaining procedures of the Railway Labor Act.

In *Texas v. United States*, 292 U. S. 522, 530 (1934), this Court declared that the Transportation Act of 1920 had "introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service." Referring to the policy considerations underlying the 1920 Act and the Emergency Railroad Transportation Act of 1933, the Court stated further (at pp. 530-1):

"It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Cases cited.] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of

the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities.' "

Subsequently, the Transportation Act of 1940 again amended the Interstate Commerce Act in order to emphasize further the policy considerations referred to in the *Texas* case. Following the passage of the 1940 Act, this Court, in *Seaboard Railroad Company v. Daniel*, 333 U. S. 118 (1948), had occasion to refer to railroad transportation policy in the following terms (at pp. 124-5):

"Congress has long made the maintenance and development of an *economical and efficient* railroad system a matter of *primary national concern*. Its legislation must be read with this purpose in mind."

As one method of realizing these objectives, Congress has sought to encourage, through the orderly process of public regulation, the elimination of unprofitable services and operations which have been rendered obsolete by the forces of change. The abandonment of unprofitable branch lines, the consolidation and merger of separate companies, pooled operations, and the elimination of duplicate facilities through joint use of remaining facilities, are among the specific procedures available for the minimization of waste. All of these sources of potential economies are subject to the regulatory authority of the Interstate Commerce Commission, primarily for the purpose of resolving competing considerations of local interests and transportation needs with the broader national interest in a financially solvent transportation system. *Colorado v. United States*, 271 U. S. 153 (1926); *Schwabacher v. United States*, 334 U. S. 182, 191-5 (1948).

Not all aspects of regulation directed toward the fulfillment of these primary economic objectives have been committed by Congress to the Interstate Commerce Commission. Stations and station agency service is one important phase of interstate commerce which Congress has determined can be left for the present to state regulation. This decision was deliberately reaffirmed in connection with an extensive review undertaken by Congress of the relative roles of federal and state agencies in promoting the economic aims of railroad regulation. This review culminated in the Transportation Act of 1958 (72 Stat. 568; 85th Cong. 2d Sess. S. 3778). The legislative history of those aspects of the 1958 Act dealing with the relationship of federal and state regulation demonstrates the interest of Congress in the effective operation of state regulation of stations as an instrument and adjunct of federal policy.

Section 5 of the Transportation Act of 1958, creating a new Section 13a in the Interstate Commerce Act, vests an ultimate jurisdiction in the Interstate Commerce Commission over the discontinuance of trains or ferries, whether in interstate or intrastate commerce. In the form originally submitted to the 85th Congress, 2d Session, in S. 3778 and H. R. 12832, the Transportation Act of 1958 would have created federal jurisdiction over an additional subject by vesting in the Interstate Commerce Commission authority over the discontinuance of "the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign, and intrastate commerce, or any of them, *or of the operation or service of any station, depot or other facility where passengers or property are received for transportation in interstate, foreign and intrastate commerce, or any of them.*"

Prior to the introduction of S. 3778 by Senator Smathers, hearings had been held during January, February, March

and April of 1958 before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce of the Senate. The report, with recommendations, of the Subcommittee was issued on April 30, 1958. (The report was later published as part of the report of the full Committee on Interstate and Foreign Commerce on S. 3778, issued on June 3, 1958 (S. Report No. 1647).) As originally introduced on May 8, 1958, S. 3778 reflected the views of the Subcommittee which were formulated subsequent to its earlier hearings.

During these hearings there was received a written statement from Commissioner John M. Ropes of Iowa (Hearings, pp. 1815-1828). Commissioner Ropes first suggested that the railroads could achieve greater state cooperation in their efforts to effect necessary economies through more imaginative and comprehensive presentations. Thus, he stated as follows (Hearing, p. 1816):

"The railroads must develop new attitudes and new approaches to problems brought before the state regulatory bodies. Piecemeal requests by the railroads to state commissions for authority to remove trains and agency service fails to impress state regulators. The old axiom, 'Ask and ye shall receive,' should become the policy of the railroads, and each application should be of such magnitude that its relation to the system operation can be readily appreciated. In far too many instances the application is isolated from the overall railroad picture. If the railroads have a program that is salable they must sell it."

As an example of what could be achieved by railroads through more orderly planning, he referred to the agency dualization program of the Minneapolis and St. Louis Railway Company in the following terms (Hearings, pp. 1816-1817):

"Consolidation of some rail services should be made rather than the discontinuance of such service alto-

gether. The Minneapolis and St. Louis Railway Co. has initiated a program in Iowa and surrounding States providing for dualization of agency service in some of the smaller communities located on its line. Other carriers are doing likewise. Briefly, this program provides for 1 man handling the railroad business of 2 or more small communities. Where the program has been inaugurated with the authority of the State commission the people of those communities have been satisfied with the service, and the railroads have made a substantial savings."

Again referring to agency dualization in his oral testimony, Commissioner Ropes said (Hearings, p. 1821):

"For example, the Minneapolis & St. Louis Railway Co., and now the Chicago-Northwestern Railway Co. has initiated in the Midwest, and I imagine surrounding areas, programs to dualize agency service.

"Briefly, this program is one where 1 agent handles the railroad business at 2 or more small communities. We have found where the program has been inaugurated with the permission of the State commission, the people of the communities have been satisfied with the service and the railroads have made substantial savings."

Strong opposition to transferring any existing state regulatory authority over railroad services to the Interstate Commerce Commission was offered by Mr. Leighty, President of both the ORT and the RLEA (Hearings, pp. 1985-2038). Mr. Leighty emphasized that, in his opinion, the states had been very effective in permitting the realization of railroad operating economies. On this point Mr. Leighty said (Hearings, p. 2027):

"The railroads have abandoned entirely too many stations and cut out too much service already, for their own good. State commissions have gone too far in authorizing these cuts."

A principal objection raised by Mr. Leighty to the creation of federal jurisdiction was the burden on protesting communities of requiring them to send representatives to Washington to oppose service discontinuances (Hearings, p. 2028). Mr. Leighty's opposition to any added federal jurisdiction, even while expressing dissatisfaction with the thoroughness of state regulation in permitting economies, is reflected in this exchange with a Subcommittee member (Hearings, p. 2028):

"Senator Purtell. You want it left in these States even though you tell me that some State agencies have permitted the railroads to do as they will?

"Mr. Leighty. That's right."

On June 3, 1958 Section 4 of the bill containing the proposed new Section 13a to the Interstate Commerce Act was recommended by the full committee to the Senate in the form originally introduced (S. Report No. 1647, 85th Congress, 2d Session; Cong. Rec., page 9966). S. 3778, as recommended by the full committee, was debated on June 11, 1958 (Cong. Rec., pages 10836-10868). During this debate, Senator Russell moved to strike the entire Section 4 of the Act, terming it "a direct and drastic blow to the authority of State regulatory bodies . . . ." Like Mr. Leighty during the hearings, Senator Russell made the dual point that state regulation was already effective in permitting the realization of railroad economies and that federal regulation would inconvenience the residents of many local communities by requiring them to present their case in Washington, D. C. Thus, Senator Russell stated (Cong. Rec. page 10850):

" . . . it may take a little time for the lawyers for the railroad to act, and it may take a little trouble, but they usually succeed in closing the station. But under this provision the people in small towns would even be denied their day in court:

"I can understand why the railroads might prefer to have all of these matters handled in the Interstate Commerce Commission, but in the long run the railroads usually have their way before most of the local State regulatory bodies, if they have a good and sufficient case."

H. R. 12832, corresponding to S. 3778, was introduced in the House on June 5, 1958 by Rep. Harris (Cong. Rec., page 10345). Section 4 of this House Bill contained a proposed new Section 13a to the Interstate Commerce Act, the first paragraph of which included the same provisions as those found in S. 3778, as originally introduced and subsequently recommended by the full Senate committee. The Bill was referred to the House Committee on Interstate and Foreign Commerce, which, on June 18th in House Report No. 1922, reported its approval of H. R. 12832 together with recommended amendments. The recommended amendments included changes in the proposed Section 13a(1) under which all reference to any "station, depot or other facility" was eliminated. Thus, as recommended by the House committee, federal jurisdiction would have been extended to cover only the discontinuance of trains or ferries.

H. R. 12832, in the form recommended by the House committee, was debated on June 27th (Cong. Rec., pages 12522-12563). During the debate Rep. Roberts expressed opposition to the inclusion in the Bill of the proposed Section 13a, even as amended. The principal basis stated for his objection was that the states, as a whole, were already doing a "good job" with reference to the basic problem of eliminating uneconomical services. In his following comments, Rep. Roberts referred in part to the effect of state regulation in the area of agency discontinuances (Cong. Rec., page 12537):

"I might say that my reservation is to that part of"

the bill which virtually by-passes the State Commissions. We had testimony from Mr. McDonald, who is president of the National Association of Railroads and Utilities Commissions. This organization has made a study of this problem for the last 8 years. As far as I have been able to find out, the proponents of this new section, which would virtually emasculate State regulation, did not make out a very good case.

"The figures which are contained in the supplemental views and carried at page 21 of the report show that out of a total of 1,274 applications for abandonment only 197 were refused by the State commissions. This means that almost 86 percent of these applications were granted.

"In the case of agency discontinuances, the figures are almost the same. Out of a total of 2,466 applications there were refusals in only 372 cases."

As finally submitted to conference, the Senate and House versions of S. 3778 differed with regard to the treatment of any "station, depot or facility." The Senate bill, which had been amended to limit the newly proposed federal jurisdiction to operations or service in interstate and foreign commerce, included within such jurisdiction any "station, depot or facility." As passed by the House, however, S. 3778, while including all trains or ferries in interstate, foreign *and intrastate* commerce, would have created no federal jurisdiction over any "station, depot or facility."

In the version finally recommended to the House and Senate by its conferees, Section 4 of S. 3778, containing the proposed Section 13a to the Interstate Commerce Act, was included as Section 5 of the Act. The issue of including intrastate trains and ferries within the proposed Section 13a was resolved by such inclusion, combined with a distinction in the procedures to be followed in connection with interstate and intrastate train discontinuances. Consistent with the House version, however, all reference

in the proposed Section 13a to any "station, depot or facility" was eliminated.

The report and recommendations of the conference committee were submitted to the Senate and House on July 30th (H. Report No. 2274; Cong. Rec., page 15645). In his explanation of the committee's recommendation, Senator Smathers stated (Cong. Rec., page 15528):

"\* \* \* the Senate receded on a provision under which we had given the Interstate Commerce Commission jurisdiction also to discontinue service in transportation, terminals and other such facilities in connection with the operation of railroads. We left that matter in the hands of the State regulatory agencies."

S. 3778 was approved by the House and Senate in the form recommended by its conferees. (Cong. Rec., pages 15529 and 15645-48).

The legislative materials thus suggest that a combination of three factors ultimately resolved the issue against vesting this additional authority in the federal agency: (1) the desire to minimize the restrictions on the jurisdiction of state regulatory agencies, notwithstanding a general recognition of the importance of effecting substantial economies in all areas of railroad operations; (2) a belief that federal jurisdiction over stations and depots would result in hearings distantly located from the communities involved, thus imposing a difficult burden on local interests in being heard; and (3) a frequently expressed conviction that the state commissions were acting with due regard for increased economy and efficiency. There was no suggestion of any lack of concern about the importance of effective regulation in that phase of interstate commerce represented by station services and facilities.

One basis for this vital concern is the direct relationship between branch line abandonments (subject to the jurisdic-

tion of the Interstate Commerce Commission) and the more efficient operation of station agencies (subject to state jurisdiction). The crucial character which this relationship often assumes is demonstrated in a recent branch line abandonment proceeding in which authority was denied in great part because of the failure of the carrier to avail itself fully of potential economies resulting from changes in agency operations. The Interstate Commerce Commission said (*Missouri Pacific R. Co. Abandonment, Crete Branch*, 307 I. C. C. 189 (1959) (at pp. 202-3):

"There are six full-time station agents employed on the branch, one for every 10 miles on a line which runs only one freight train each day. All are employed in stations that were rebuilt during the years 1951-53. Protestants are of the view that the branch could function adequately by eliminating all of these agents; or by employing one, located strategically, to serve the entire branch.

"Applicant concedes that, in the face of then existing operating losses on the branch, no attempt has been made since 1953 to reduce the number of station agents on the branch. It also admits that the stations on the branch were rebuilt under the above-mentioned rehabilitation program even though it was then faced with constant losses resulting from the substantial reduction of traffic on the branch. According to applicant, the elimination of the station agents would result in an annual saving of approximately \$25,000. Even though only half of this sum could be saved, such amount would help reduce the possibility of a deficit."

The orders of the South Dakota and Iowa commissions approving the Central Agency Plan show that the controlling criterion was the public interest in efficient and economical transportation. Both orders reflect an acute awareness of the responsibilities of state regulatory agencies in promoting the dominant national aims of Congress in this area. Thus, these orders, and the similar orders

of the Wisconsin and Minnesota commissions, do not involve purely local interests. They must be considered in their essential role as instrumentalities consciously utilized by Congress to further its aims in an important segment of interstate commerce.

The passenger train analogy is conclusive of the impropriety of this demand. For many years Congress was content to utilize state regulation for this important sector of interstate commerce. Because it came to believe that the federal interest was not being adequately protected by the state commissions, it decided, in the Transportation Act of 1958, to pull this regulation up to the federal level; and the Interstate Commerce Commission was given jurisdiction over passenger train discontinuances. If the unions whose members fill positions in passenger train service were to endeavor to frustrate I. C. C. orders by using the Railway Labor Act to freeze such positions, is it conceivable that the Court would regard this as within what Congress intended to be the objects of that statute? And is the federal interest to be protected any less where, as here, Congress has made a conscious decision to keep on using state regulation for the accomplishment of its purposes in the regulation of station agencies?

The ORT, overlooking this element of federal interest, asserts that *California v. Taylor*, 353 U. S. 553 (1957) and *Local 24 of International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959), establish that state regulation is always to be subordinated to collective bargaining agreements deriving from federal labor relations statutes. The

1. The force of this analogy lies behind the Court of Appeals' comment that (R. 384-5):

"It is perhaps significant that on oral argument, counsel for the Union expressed the opinion that a demand for veto over discontinuing trains, while less reasonable than that proposed here, would constitute a bargainable issue under the Railway Labor Act."

*Oliver* case involved the relationship between (1) certain long-standing collective bargaining provisions relating to wages previously entered into under the Labor Management Relations Act, and (2) a subsequent state court construction of a state antitrust statute having general application, but only within the area of intrastate commerce. The exercise of state authority did not occur in a regulatory field in which Congress has continued to rely on effective state regulation as a means of furthering its own policies with regard to efficient and economical transportation in interstate commerce.

*California v. Taylor* holds only that it was the intent of Congress that a state which owns and operates a railroad otherwise subject to the provisions of the Railway Labor Act must stand in the position of management under the Act. That case does not purport to deal with the separate issue of whether Congress intended that collective bargaining procedures of the Railway Labor Act can be used to circumvent state regulatory authority exercised in the national interest. Neither of these cases conflicts with the accommodation between the orders of state public utility regulatory agencies and the collective bargaining provisions of the Railway Labor Act reached in the *Terminal Railroad*, *Norwood* and *North Shore* cases.

The ORT further suggests that the orders of the state regulatory commissions in this case, being only permissive in form, must give way to its affirmative demands submitted under the provisions of the Railway Labor Act (ORT Brief, p. 56). As noted above, the permissive character of the state regulatory order in the *North Shore* case did not preclude a determination by the federal courts that the Railway Labor Act imposed no disabilities on the effective operation of state authority. But, perhaps even more significantly, Congress itself has chosen to utilize the combination of managerially initiated proposals and per-

missive administrative orders to provide the effectiveness which it seeks in its regulatory enactments. Thus, Interstate Commerce Commission orders, permissive in form though they may be, are not to be regarded as administrative favors bestowed on private interests for purely private purposes. On the contrary, they reflect the essential mutuality of the public, and of the managerial, interest in the avoidance of waste. In this connection Justice Brandeis has stated, with specific reference to branch line abandonments: "The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination." *Colorado v. United States*, 271 U. S. 153, 162 (1926).

Managerial initiative necessarily underlies the system of largely permissive authority which is basic both to federal and state regulation. Managements propose, and the commissions dispose. The importance of such initiative in achieving the public aim of waste avoidance is emphasized in the following criticism made by the Senate Committee on Interstate and Foreign Commerce in its report on S. 3778, culminating in the Transportation Act of 1958 (S. Report No. 1647, 85th Cong., 2d Sess., p. 11):

"The railroad industry has not, in the sub-committee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; joint use of facilities in order to eliminate waste, such as multiple terminals and yards that require expensive interchange operations; reduction of duplications in freight and passenger services by pooling and joint operations; abandonment or consolidation of nonpaying branch and secondary lines; abolishing of unnecessarily circuitous routes for freight movements; improved handling of less-than-carload traffic; coordination of transportation services and facilities by establishment of through routes and joint rates with other forms of transportation; and modernization of the freight-rate structure, including revision of below-

cost freight rates to levels that cover cost and yield some margin of profit as well as adjustment of rates excessively above cost to attract traffic and yield more revenue."

Adaptive response to technological change, for which Congress looks to managerial initiative in the first instance, requires the submission of many proposals for prior approval by regulatory agencies. The primary function of such regulation is to impose a *public veto* in situations where management, in seeking the avoidance of waste, may have failed to give adequate consideration to other aspects of the public interest.

The ORT's demand seeks to displace this public veto with a purely private one. It obscures this assumption of governmental power by saying that the job freeze involved is nothing more than one of the manifold aspects of employment stabilization and job security. Yet the legislative history of Section 5(2)(f) of the Interstate Commerce Act conclusively demonstrates that Congress, in seeking to further the objectives of its National Transportation Policy, has found the job freeze to be incompatible with its legislative purposes (49 U. S. C. Sec. 5(2)(f)).

Section 5(2)(f), enacted as part of the Transportation Act of 1940, provides for mandatory employee protective conditions with respect to all transactions falling within the scope of the unification provisions of Section 5(2) of the Interstate Commerce Act. A detailed resume of important aspects of the legislative history of Section 5(2)(f) is found in *Railway Labor Executives' Association v. United States*, 339 U. S. 142 (1950).

In the legislative proceedings leading to the enactment of the 1940 Act, the labor-management group managing the bill made this recommendation with respect to protecting the interest of employees affected in the bill as originally introduced:

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

When the bill reached the floor of the House, Representative Harrington offered an amendatory proviso which would have quite clearly changed the entire concept, purpose and effect of these provisions:

"*Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*"

The profound change which would have been wrought by this amendment was noted by this Court in the *Railway Labor Executives' Association* case (339 U. S. at p. 151):

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations together with a recognition that employees could and should be fairly and equitably protected. *This amendment, however, threatened to prevent all consolidations to which it related.*"

Recognizing the stultifying effect the proposed amendment would have had on railroad unifications, the Legislative Committee of the Interstate Commerce Commission expressed its strong opposition in the following communication to Congress:

"As for the (Harrington) proviso, the object of unifications is to save expense, *usually by the saving of labor*. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad man-

*agements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees."*

Section 5(2)(f) was ultimately enacted in its present form. The principle of the job freeze was rejected. Congress concluded that it could not embody that principle in the Interstate Commerce Act without compromising the national interest in economical and efficient rail service.

Like Congress in enacting Section 5(2)(f), North Western has recognized the profound distinction between demands calculated to stagnate the process of adaptation to economic and technological change, on the one hand, and proposals to ameliorate the impact on individual employees, on the other. With respect to the latter, the North Western was originally—and remains—a party to the Washington Agreement of 1936. The ORT and RLEA purport to find this agreement indistinguishable from the ORT's proposed power to impose a job freeze (ORT, R. 23-4; RLEA Brief, p. 39). It is, of course, correct to state that the Washington Agreement does deal broadly with the abolition or discontinuance of jobs. But the approach of this agreement is directly contrary to the concept of the job-freeze which the ORT now proposes. In recognition of the inevitable impact of technological change on the number of positions, the Washington Agreement seeks to provide a system of financial benefits for employees who are adversely affected by the abolition of positions. In addition, the record shows the steps which North Western has taken to provide severance pay for displaced employees, and the failure of its efforts to interest the ORT in any such plans.

Thus, the ORT's demand must be carefully distinguished from a proposal for financial benefits for the incumbents of positions abolished in consequence of orders of public regulatory agencies. The proposal seeks instead

to confer ultimate and decisive control over the position itself, together with the power to maintain a complete job freeze. If this job freeze is, as claimed by the ORT, nothing more than a manifestation of employment stabilization and job security, it is nevertheless one which Congress has deliberately rejected in connection with the unification provisions of the Interstate Commerce Act. Having regarded the job freeze as offensive to its purposes under Section 5 of the Act, can it be assumed that Congress intended that the job freeze could, through the collective bargaining procedures of the Railway Labor Act, be imposed on other equally vital phases of the regulatory process, whether administered by federal or state agencies? The question answers itself.<sup>1</sup>

The ORT asserts that the decision below "presents a revival of the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed." But we have already been reminded this Term that:

"• • • as the preamble to the Norris-LaGuardia Act indicated, the formulation of policy of that statute was made in 1932 'under prevailing economic conditions.' Congress at different times and for different purposes may gauge the demands of 'prevailing economic conditions' differently or with reference to considerations

1. It is interesting to note that the statement of National Transportation Policy preceding the 1940 Transportation Act, as originally submitted (S. 2009), and as reported to the Senate by its Committee on Interstate Commerce and passed by it (S. Report No. 433, p. 6; 76th Cong., 1st Sess.; 84 Cong. Rec. 5869, 5873), provided that the provisions of the Interstate Commerce Act were to be administered so as to "• • • encourage fair wages and equitable working conditions *established through collective bargaining* • • •." As reported by the House Committee, however (H. Report No. 1217, 76th Cong., 1st Sess.), the proposed statement of a National Transportation Policy in S. 2009 was amended so as to delete "established through collective bargaining." S. 2009 passed the House with this clause in the form recommended by its committee (84 Cong. Rec. 10127). As finally enacted in the form recommended by a second Conference Committee (H. Report No. 2832, 76th Cong., 1st Sess.), the phrase remained out.

outside merely 'economic conditions' \* \* \* " *United Steelworkers v. United States*, ..... U. S. .... (1959), concurring opinion.

The same representation was pressed upon the Court in the *Graham* and *Howard* cases, namely, that the federal injunctive relief there involved was an improper dilution of the policies of Norris-LaGuardia. But the process of accommodating existing law to emerging considerations of policy is a continuing one. *Brown v. Board of Education of Topeka*, 347 U. S. 483, 492-5 (1954). It has no less of a role with respect to Congressional policies adopted in differing historical contexts and with reference to distinctive, and frequently divergent, social and economic problems. The Norris-LaGuardia Act can stand as no single exception to this truth. *Allen-Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797, 806 (1945).

Inevitably Norris-LaGuardia must be read in the light of other legislation, including that which seeks to promote an economical and efficient national transportation system. When Norris-LaGuardia and the Railway Labor Act are read in this light, it becomes evident that Congress did not intend that interruptions to interstate commerce by strikes, which it sought to avoid by enactment of the Railway Labor Act, could be founded upon a demand aimed in purpose and effect against the effectuation of regulatory orders directly implementing federal policies.

**B. An Improper Demand Imposes No Duty to Bargain and a Strike Founded Upon It Is Properly Enjoined.**

The record discloses the continuing efforts of North Western to bargain on a mutually acceptable program to ameliorate the impact of the Central Agency Plan on displaced employees. No less does it disclose the adamant refusal of the ORT to budge from its initial demand for a

veto power over the positions themselves. Thus, on this record, it is appropriate to suggest that those portions of the ORT and RLEA briefs dealing with the duty to bargain are more aptly directed to the ORT itself.

Of more general significance regarding the duty to bargain, whether under Norris-LaGuardia or the Railway Labor Act, are the inevitable implications of the *Howard* case. In the light of that case, could it be urged today that a demand which seeks job security through racial discrimination would impose a bargaining obligation?

Whatever the differences between the subject matter of the contract in *Howard* and the demand for a contract in this case, that case refutes the ORT's contention that Congress intended to provide no more than a framework for bargaining and was unconcerned with the nature of the demands fed into the process.<sup>1</sup> True friends of railway labor

1. The Court of Appeals below, in holding the ORT's contract did not pertain to "rates of pay, rules, or working conditions" under the Railway Labor Act because of its conflict with regulatory authority, observed in the course of its opinion that "• • • the demand is not within the scope of mandatory bargaining (R. 382)." The citation of *N. L. R. B. v. Borg-Warner Corp.*, 356 U. S. 342 (1958) followed. In *Borg-Warner* this Court had held that the employer's proposals in issue were not within the applicable standards of "wages, hours, and other terms and conditions of employment," under the National Labor Relations Act, and were, therefore, beyond the scope of mandatory bargaining.

The court below then proceeded to cite the racial discrimination cases as establishing the concept of contract proposals, unlawful in the sense of not being within the scope of the Railway Labor Act (R. 384). Because the racial discrimination cases did not utilize a convenient phrase to express this concept, the Court of Appeals had thus found it useful to cite the phraseology of *Borg-Warner* concerning the scope of mandatory bargaining. Even while characterizing the court's use of *Borg-Warner* as "presumptuous", the ORT concedes the validity of the limited proposition for which it was used (ORT Brief, p. 40): "Either the subject of the proposal is one on which agreement would be unlawful, or it is one with respect to which bargaining is mandatory." Congress did not create an administrative agency under the Railway Labor Act to determine the lawfulness of particular contract proposals. The function of resolving issues of lawfulness has, therefore, devolved upon the federal courts, where it has in fact been exercised.

will recognize what a double-edged sword is concealed within that claim. For the Railway Labor Act is not a one-way street; it provides for demands by management as well as by labor, with a resulting right in the former to terminate the employment relation after exhaustion of the non-compulsory processes of the Act. Will the ORT concede that its members may be legally locked out upon the basis of any demand the North Western may choose to serve, and to stand upon, under Section 6, no matter how outrageous in its purpose and effect with respect to independent unionism? It could not, without betraying the cause of railroad labor.

The inescapable teaching of *Howard* is that this Court sits to proclaim and protect the dominant policies of Congress as this Court finds them to be in any particular case. If the vindication of those policies requires the scrutiny of a demand made under Section 6, then that must and will be done. No amount of generalizing about the benefits of collective bargaining can foreclose this inquiry. Unlimited collective bargaining for a regulated industry may not, in the view of Congress, be invariably superior to the integrity of the regulatory process itself. After all, a regulated railroad cannot stop rendering service to the public because it disagrees with a regulatory decision. No more could Congress have intended that the railroad's employees can acquire the power to stop that service by a collective bargaining demand expressing their disagreement with a regulatory decision.

Any industry must and should make provision for the human costs of change. What cannot be stifled, consistently with the public interest, is change itself. Had the approach of the Luddite rioters of 1812 prevailed, with what material resources would England have sustained its lonely grandeur of 1940? Congress cannot be taken to be oblivious of the implications for the present hour of the sapping

of national strength by freezing wasteful jobs into the industrial structure. How plain this is in the case of a regulated utility not free to define waste unilaterally, but under the necessity of proving that waste exists to the satisfaction of a public agency! Congress, having expressly contemplated this necessity in aid of its policy of fostering economical and efficient transportation in interstate commerce, can hardly be deemed to have made the Railway Labor Act a vehicle for the frustration of that policy by a private group.

## V.

### **THE PROPRIETY OF THE ORT'S DEMAND UNDER THE MORATORIUM PROVISIONS OF AN EXISTING AGREEMENT CREATED A MINOR DISPUTE PRESENTLY PENDING BEFORE THE ADJUSTMENT BOARD.**

The ORT and North Western, together with all of the major railroads and most of the labor organizations, were parties to the National Agreement of November 1, 1956 (R. 263-84). Article VI of that agreement (R. 268-9) contains a moratorium clause which provides in substance that the parties thereto will not, during the period ending October 31, 1959, serve any notice under Section 6 of the Act which, among other things, will operate to "establish agreements providing the rate of compensation, covering \* \* \* time paid for but not worked \* \* \*." While the dispute created by the proposal made by the ORT was still being handled on the property, North Western formally notified the ORT that it considered the latter's proposal to be barred by the terms of this moratorium; and it has formally submitted that issue to the Adjustment Board, which has received and docketed the submission and where the issue is pending for determination.

If North Western is correct in its interpretation of the

moratorium clause as it relates to the ORT's present proposal, there would clearly be no right to strike to enforce the demand. With this issue actually submitted to and pending before the Adjustment Board for exclusive and final determination, the District Court, under *Chicago River*, was bound to grant an injunction on this ground alone.

The ORT has sought to avoid this result by the contention that North Western is wrong in its construction of the moratorium provisions. On its merits this argument seems to rest on the point that the moratorium provisions contain an exception for proposals relating to "stabilization of employment," and that the ORT's proposal falls within this exception. As *Chicago River* clearly holds, however, the proper place for the resolution of these opposing contentions is the Adjustment Board. The only question bearing on the merits which might be appropriately considered by the courts is that of the substantiality of the position taken by North Western with respect to the moratorium provisions. If that position is not merely frivolous, then the concern of the courts with the merits is at an end.

There is no lack of substance in fact. This is plain from a reading of the formal submission of the issue made by North Western to the Adjustment Board (R. 247-300); and, in particular, from the earlier holding of Judge Nathan Cayton as neutral chairman of a Special Board of Adjustment (R. 292-6). In this case Judge Cayton sustained the railroads' position that the moratorium barred a contract proposal for a "stabilized season of employment for all ore dock employees \* \* \* for a period of not less than eight (8) months consisting of not less than 1,386½ hours \* \* \* in each calendar year." He said (R. 291):

"It seems clear that the proposal here made in behalf of ore dock workers would increase their rates of

pay (fixed in preceding Articles of the Agreement) by, in effect, providing for their compensation on a seasonal rather than an hourly or weekly basis, and *without regard to the needs of the industry or the amount or volume of its business. This is not stabilization of employment in any reasonable or fair sense.*"

Surely it cannot be said, in the light of the relevance of these comments to the retroactive job freeze proposal made by the ORT, that North Western's claim as to the ban of the moratorium provisions is a purely frivolous one. The record shows that another railroad, the Minneapolis and St. Louis, had previously submitted the same issue to the Adjustment Board, arising from an identical demand made by the ORT (R. 152, 313). When the District Court stated that the moratorium provisions did not apply; it was ruling on the merits of North Western's claim; and it thereby erred in deciding an issue committed by Congress to another agency.

Another avenue of escape attempted by the ORT is the assertion that North Western's claim of the ban of the moratorium provisions was tardily raised. But, as the record shows, the claim was made while the issues raised by the ORT's contract proposal were still being handled on the property (R. 70, 100, 107). In the absence of any specific time limitation fixed by law for the making of such a claim, the only measure of delay, in the terms of any penal consequences to be attributed to it, is that of injury suffered by the ORT because of the alleged delay. The ORT showed no injury of any kind on the record, presumably because it could not. The decision of the District Court did not turn in any degree upon this charge of delay.

## VI.

**THE DISTRICT COURT HAD JURISDICTION.**

The ORT has chosen to urge in this Court for the first time a jurisdictional issue neither argued nor decided in the courts below. The ORT suggests the absence of diversity, and then addresses its arguments on the merits to the separate question of jurisdiction.

North Western's claim to injunctive relief is expressly predicated on Sections 1331 and 1337 of the Judicial Code; the Railway Labor Act; and the Interstate Commerce Act (R. 5). The right not to be subjected to a strike on the facts of this record is asserted to accrue to North Western under these federal statutes relating to interstate commerce.<sup>1</sup> If this claim of right is not simply frivolous, there was jurisdiction in the District Court to hear and determine it, whatever its merits or whatever limitations might be found to exist with respect to the particular relief sought. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951), and *Romero v. International Terminal Co.*, 358 U. S. 354 (1959). This distinction was recently given effect by the Court of Appeals for the Second Circuit when, in speaking of a federal claim of right asserted by an employee under the Railway Labor Act, the court said:

“ . . . (Plaintiff) asserts this claim against both the railroad and the union. Whether he is right or

1. The ORT cites *Gully v. First National Bank*, 299 U. S. 109 (1936). The following basic test for federal jurisdiction is there stated (299 U. S. at p. 112):

“The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.”

wrong, there is jurisdiction, 28 U. S. C. Sections 1331, 1337, even without diversity • • •”

*Cunningham v. Erie Railroad Company*, 266 F. 2d 411, 414 (2d Cir. 1959); and see *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955), cert. den. 350 U. S. 967.

*Chicago River*, where no diversity existed and the jurisdictional allegations were identical with those made by North Western, is ample authority on this point. In stating that no issue of jurisdiction was raised in that case, the ORT is wrong (ORT Brief, p. 48). The answer expressly challenged federal jurisdiction in these terms:

“3. Referring to Paragraph 8 of the Amended Complaint, defendants deny that this Court has jurisdiction of this suit. They deny that this is an action arising under the Constitution of the United States on the Fifth Amendment or the laws regulating commerce. They deny that this Court has jurisdiction of this action under the provisions of 28 U. S. C. 1331 and 1337, or of 45 U. S. C. 151 *et seq.*, or 49 U. S. C. 1 *et seq.*, or under any provisions of the aforesaid statutes. • • •”

In *Brotherhood of Railroad Trainmen v. T. P. & W. R. R.*, 321 U. S. 50 (1953), this Court did not find it necessary to resolve the jurisdictional issue. It, therefore, left undisturbed the holding of the Court of Appeals that a claim of federal right was properly rested upon the general common carrier obligations imposed on the railroad under the Interstate Commerce Act. *T. P. & W. R. R. v. Brotherhood of Railroad Trainmen*, 132 F. 2d 265, 268-70 (1942). This decision was followed in *Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114, 119-22 (1957), cert. den. 355 U. S. 877 (1958), Judge (now Mr. Justice) Stewart dissenting.

The federal right asserted here by North Western is not derived solely from its general obligations under the Interstate Commerce Act. It comprehends as well a right under the Railway Labor Act to be free from a strike founded upon a demand having the demonstrated purpose and effect of frustrating regulatory orders in aid of Congressional policies. In this respect, the conflict between the threatened strike and the regulatory process is more direct and potentially disruptive of Congressional aims than those involved in *T. P. & W.* and *New York Central*.

## VII.

### **THE EMERGENCY MEDIATION GAVE RISE TO A SECOND 30-DAY COOLING OFF PERIOD.**

The District Court's order granting injunctive relief on the merits expired September 19, 1958, and is now moot. The Court of Appeals did not pass upon it.

The ORT has devoted the major part of its argument to the contention that Section 5, First, of the Railway Labor Act imposes *no* cooling off period upon labor. This view is not shared by the Mediation Board (Brief, pp. 4-5) and see *Brotherhood of Railway and Steamship Clerks v. Railroad Retirement Board*, 239 F. 2d 37 (D. C. Cir. 1956), in which the court said (at p. 43):

"We must agree with the Board's ruling that a strike can violate the Railway Labor Act although it was not commenced during the period after creation of an emergency board. \* \* \*"

In any event, there is no issue on this record as to a cooling off period after the first mediation.

With respect to a second cooling off period after a mediation pursuant to a proffer of services, the language of Section 5, First (see pp. 6-7 of the ORT Brief) is con-

trolling. The key words for present purposes are the first three in the third full paragraph, namely, "(I)n either event". These can only be reasonably read to refer to each of the preceding two paragraphs, the first of which relates to mediation pursuant to invocation by the parties, and the second to mediation pursuant to a proffer of services. The purpose of mediation, as conceived of by Congress, is obviously the same in both cases, that is to say, to bring the parties together in the hope that the confrontation may be fruitful, in terms of voluntary agreement, for the prevention of devastating interruptions to interstate commerce. Once the connection has been made through mediation, Congress thought it essential that a period of time be provided in which the beneficial results of the connection might manifest themselves. The requirement of a 30-day period provides such time.

The specific question which the District Court had to decide was, does the 30-day provision in the last paragraph of Section 5, First, apply in the case of either type of mediation? Its answer in the affirmative is consistent not only with the letter of the statute, but it is also fully in the spirit which prompted Congress to state its basic purpose in enacting the Railway Labor Act to be "(1) To avoid any interruption to commerce or to the operation of any carrier engaged thereon." 45 U. S. C. Sec. 152.

The Mediation Board submits that the statutory scheme gives no indication that Congress intended the creation of a second 30-day cooling off period subsequent to the Board's proffer of emergency mediation. The District Court's contrary construction not only corresponds to the statutory language, but is consistent with a Congressional purpose to delay strikes whenever the Board finds an emergency sufficiently serious to warrant its proffer of services, notwithstanding any prior mediation invoked by either party.

## VIII.

**THE DISTRICT COURT HAD POWER TO GRANT AN  
INJUNCTION PENDING APPEAL.**

The ORT asserts that the District Court lacked power to grant an injunction pending appeal in view of its conclusion that the Norris-LaGuardia Act deprived it of jurisdiction to grant North Western injunctive relief on the merits beyond September 19, 1958. The Court of Appeals, in holding that a permanent injunction beyond that date should have been entered, did not reach this point.

This claim of an absolute lack of power was urgently pressed upon the District Court at the time the injunction was entered, and it was renewed later on a motion to dissolve. It was the subject of a motion to dissolve in the Court of Appeals; of a petition to this Court for certiorari in advance of judgment, and of a motion for leave to file mandamus against the Judges of the Court of Appeals; and of an application for a stay to the Circuit Justice. These were uniformly unsuccessful; and were supported by the same arguments once again urged upon this Court.

The action of the District Court was expressly authorized by the terms of Rule 62(c) of the Federal Rules of Civil Procedure. The ORT argues, however, that an implied exception must be read into that Rule making it inoperative in cases where Norris-LaGuardia applies. The ORT's argument on this point is devoted entirely to the contention that the Federal Rules of Civil Procedure did not amend the Norris-LaGuardia Act. The merit of this claim, however, necessarily rests on the proposition that the Norris-LaGuardia Act itself withdrew from the District Court the power to grant injunctions pending appeal. The ORT cites no authority whatsoever in support of this proposition, and indeed does no more than make a flat

assertion of its truth. It is important to note that the ORT's argument, although confined in terms to the power of the District Court, would also deprive both the Courts of Appeals and the Supreme Court of the power to grant injunctions pending review. In every case where a District Court decided that Norris-LaGuardia precluded injunctive relief, therefore, its decision would for all practical purposes be non-reviewable, regardless of whether there was a substantial question as to the correctness of that decision or whether it conflicted with the decisions of other courts. In other words, a strike could take place that would render moot any subsequent review of the correctness of the trial court's decision.

Apart from any question arising out of Norris-LaGuardia, there is no doubt that the federal courts, both at the district level and those of appellate jurisdiction, have had from the beginning the power to grant injunctions pending appeal, even though a permanent injunction has been denied on the merits. This power is presently embodied in the All-Writs Statute (28 U. S. C. 1651), and Rule 62 of the Federal Rules of Civil Procedure, which carries forward the similar provisions of former Equity Rules 93 and 74. It has been reaffirmed by a continuous line of decisions:

*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79 (1901).

*Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission*, 222 U. S. 582 (1911).

*Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U. S. 212 (1922).

*Magnum Import Co. v. Coty*, 262 U. S. 159 (1923).

*Beaumont Sour Lake & W. Ry. Co. v. United States*, 282 U. S. 74 (1930).

*Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210 (1932).

*Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4 (1942).

The purpose of this power is obvious: It is to minimize damage to the public as well as to litigants, and to make possible appellate review of the matter in controversy.

Whether an injunction pending appeal will be granted in a particular case is a matter which, of course, lies in the discretion of the trial court. The ORT does not charge, however, that the action of the District Court was an abuse of its discretion in any respect. Its claim goes solely to the question of power.

Given the existing power of the federal courts to issue injunctions pending appeal, what then may be found in *Norris-LaGuardia* which withdraws that power?

Sections 1 and 2 of that Act on their face are directed only to (1) permanent injunctions, and (2) the preliminary restraining orders and temporary injunctions which precede the trial court's final decision. There is no reference to stays or injunctions pending appeal in either these sections or Section 10 (29 U. S. C. § 110), which deals with review of orders which issue or deny a temporary injunction.

Nor does the legislative history of the Act offer any support for the ORT's contention. Prior to its passage, *Norris-LaGuardia* received extensive consideration both in committee and upon the floor of Congress.<sup>1</sup> The evils at

1. As enacted by the 72d Congress in 1932, the *Norris-LaGuardia Act* was the outgrowth of two bills, H. R. 5315 and S. 935. See Hearings before Committee on Judiciary on H. R. 5315, 72d Cong., 1st Sess. (1932); H. R. Rep. No. 669 on H. R. 5315, 72d Cong., 1st Sess. (1932); Sen. Rep. No. 163 on S. 935, 72d Cong., 1st Sess. (1932); Conference Reports—H. R. Rep. Nos. 793 and 821, 72d Cong., 1st Sess. (1932); also, 75 Cong. Rec., Part 15 Index re H. R. 5315 and S. 935 (1932).

Similar bills were introduced previously in Congress. The legisla-

which the statute was aimed, and the scope and meaning of its various provisions, were gone over at length. Yet in all the hearings, reports, and debates there is not one reference to the power of the federal courts to issue injunctions pending appeal. It is in fact apparent from the legislative history that the focus of concern was the granting of preliminary and permanent injunctions by the District Courts, and that the situation in which the District Court denied a permanent injunction was not considered.

Unable to find anything in either the language or the legislative history of Norris-LaGuardia to support its claim, the ORT relies heavily upon the fact that the District Court's denial of injunctive relief was based upon a supposed lack of "jurisdiction." This argument rests upon the misconception that Norris-LaGuardia must be viewed in isolation.

The ultimate issue in this litigation is whether the public policies incorporated in the Railway Labor Act render the proposed strike illegal and thereby within the jurisdiction of the District Court to enjoin. Since the reviewing courts clearly have jurisdiction to determine whether that jurisdiction exists, it was wholly appropriate for the District Court to preserve existing conditions until this determination could be made. Cf. *Merrimack River Savings Bank v. City of Clay Center*, 219 U. S. 527 (1911); *United States v. United Mine Workers*, 330 U. S. 258, 289-90 (1947).<sup>1</sup>

tive history of these bills likewise contains no reference to injunctions pending appeal. See Hearings before Sub-Committee of Committee on Judiciary on S. 1482, 70th Cong., 1st Sess. (1928); Sen. Rep. No. 1060 on S. 2497, 71st Cong., 2d Sess. (1930).

1. To permit an exception to the power to grant stays in cases where dismissal was based on "lack of jurisdiction" would have far-reaching consequences, since so many federal statutes limiting the award of injunctive relief do so in jurisdictional terms. See e.g., 28 U. S. C. 1341 (enjoining collection of state taxes); 28 U. S. C. 1342 (enjoining rate orders of state agencies); 28 U. S. C. 2283 (enjoining proceedings in state courts); cf. 28 U. S. C. 1331 (federal question jurisdiction); 28 U. S. C. 1332 (diversity jurisdiction).

The ORT thus fails to show any basis for its restrictive reading of Norris-LaGuardia, much less the explicit language which this Court has held to be required in order to deprive the courts of a power, so long established and so vital to judicial administration. This is made clear by the decision in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4 (1942). That case involved review of an order of the Commission under Sec. 402(b) of the Communications Act of 1934 (48 Stat. 1064, 1093). That section, which governs review of orders granting or refusing permits and licenses, contains no provision with respect to the stay of the Commission's orders pending review. Sec. 402(a) of the Act, on the contrary, which governs review of all other types of orders by the Commission, expressly grants the power to stay. It was therefore argued by the Commission that Sec. 402(b) must be construed as withholding such power from the reviewing court. This Court strongly rejected that claim in the following language (316 U. S. at 9-11):

"No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U. S. 200; *In re McKenzie*, 180 U. S. 536."

"These controlling considerations compel the assumption that Congress would not, without clearly

expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. \* \* \*

Noting that among all the varied statutory provisions dealing with stays pending review, only one, the Emergency Price Control Act of 1942 (50 U. S. C. App. § 924(b)), explicitly withdrew the power, the Court remarked (316 U. S. at 17):

"\* \* \* Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war."

Norris-LaGuardia must be regarded therefore as leaving intact the power to issue an injunction pending appeal, and, in point of fact, the District Courts have continued to exercise that power in cases where the Act was thought to require a dismissal on the merits. See *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir., 1956), *aff'd* 353 U. S. 30 (1957); *Norfolk and Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir., 1957), *cert. den.* 355 U. S. 914 (1958); *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir., 1945), *cert. den.* 325 U. S. 852 (1945).

Since Norris-LaGuardia did not withdraw the power to grant an injunction pending appeal, the ORT's argument as to the meaning and effect of the Federal Rules is beside the point. So far as the Rules are at all relevant, however, they are adverse to the ORT's position.

Rule 62(c), as the ORT must concede, clearly authorizes the issuance of injunctions pending appeal. That Rule, together with the balance of the Rules, was, as required by the enabling act, laid before Congress for its scrutiny before it could become effective, (Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064, 28 U. S. C. § 2072). Congress per-

mitted the Rule to become effective, and in so doing presumably indicated that it found nothing therein which constituted an abridgement of any right conferred by the Norris-LaGuardia Act, which had been enacted only five years before. See *Sibbach v. Wilson & Co.*, 312 U. S. 1, 15-16 (1941).

Rule 65(e), set forth below,<sup>1</sup> upon which the ORT relies, does not compel a contrary result, when considered in context with the enabling act under which the Rules were promulgated and with Rule 82. The enabling act provides that the Rules shall not modify the substantive rights of any litigant; Rule 82 declares that the Rules shall not be construed to extend or limit jurisdiction. So far as any substantive rights or limitations upon jurisdiction found in Norris-LaGuardia are concerned, therefore, it was not necessary for the Rules to make any specific reference to that Act. Norris-LaGuardia, however, also contains provisions with respect to the issuance of restraining orders and preliminary injunctions which may be deemed procedural. Since Rule 65 also deals with those matters, it was therefore necessary to provide, in Rule 65(e), that the provisions of this Rule should not supersede those of Norris-LaGuardia.

It is correct, as the ORT argues, that Rule 65 was also not intended to modify any other provisions of Norris-LaGuardia. The point is, however, that Rule 65, with or without the saving clause, could not affect any provisions of Norris-LaGuardia except those concerning temporary

1. Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges. As amended Dec. 29, 1948, effective Oct. 20, 1949.

restraining orders and injunctions (other than stays pending appeal), for that is all that Rule 65 deals with.<sup>1</sup> When it came to dealing, in Rule 62, with injunctions pending appeal, no saving clause referring to Norris-LaGuardia was included—a clear indication that that Act was not thought to contain any special limitations upon the traditional power to issue injunctions pending appeal.

What is involved here is not, therefore, the denial of any substantive rights. This view was apparently shared by the representatives of organized labor who attended the hearings before the Committee on the Judiciary. While voicing objections to Rule 65, as well as to several other of the proposed Rules, they made no comment whatever when Rule 62(c) was read and explained. Hearings before the Committee on the Judiciary of the House of Representatives, 75th Cong., 3d Sess., pp. 37-40, 48-50, 125.

What Rule 62(c) expressly contemplates is that the enjoyment of such rights as the District Court considers the ORT to have may be postponed by the District Court pending appellate review in a proper case, in order to prevent irreparable injury to the public. The ORT makes no claim, as it could not upon this record, that this was not such a proper case, assuming the power to exist. It denies only that this power exists anywhere in the federal judicial system.

This is a sweeping claim indeed. It assigns to the right to strike an immunity from the ordinary workings of the

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1. The explanation by Mr. Mitchell (quoted at p. 61 of the ORT's brief) of the specific reference in Rule 65(e) to "temporary restraining orders and preliminary injunctions" contains the following additional sentence, omitted in the quotation:

"Doubtless the reason the advisory committee used the phrase 'temporary restraining orders and preliminary injunctions' was that they understood that everything in rule 65 was limited to temporary restraining orders and preliminary injunctions." Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, Third Session, p. 165.

judicial process not enjoyed by any other litigant. Its establishment could rest only upon the most unmistakable expression by Congress of a purpose to create this immunity. But there is no such expression.

### CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE  
Supreme Court of the United States  
October Term, 1935

THE ORDER OF RAILROAD TEAMSTERS, a Voluntary  
Association, et al., Petitioners,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,  
a Corporation, Respondent.

BRIEF ON BEHALF OF THE NATIONAL  
ASSOCIATION OF RAILROAD AND UTILITIES  
COMMISSIONERS AND ITS COUNCIL

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 100

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THE ORDER OF RAILROAD TELEGRAPHERS, a Voluntary  
Association, et al., *Petitioners*,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,  
a Corporation, *Respondent*.

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**BRIEF ON BEHALF OF THE NATIONAL  
ASSOCIATION OF RAILROAD AND UTILITIES  
COMMISSIONERS, AMICUS CURIAE**

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**PRELIMINARY STATEMENT**

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization, the membership of which embraces the members of the transportation and public utility regulatory commissions and boards of the several States of the United States except Alaska.

The Association's interest in this proceeding is on behalf of the state commissions and boards represented

in the membership of the Association, which state agencies are charged by state laws with the duty and responsibility of regulating the rates and services of rail carriers operating in their respective states.

### **STATEMENT OF THE CASE**

On November 5, 1957 the Chicago and North Western Railway Company, hereinafter called "North Western", filed an application with the South Dakota Public Utilities Commission seeking authority to close 69 one-man railroad agency stations on its lines in South Dakota, or as an alternative to such authorization by the Commission, North Western offered and proposed to inaugurate a central agency service plan by which one station agent from a central point would be required to render agency service at one or more adjacent stations.

Hearings were held before the Commission in Pierre, South Dakota on November 25 and 26, 1957 and on December 18, 19 and 20, 1957. Additional hearings were held at Huron, South Dakota on January 13, 1958 and at Rapid City, South Dakota on January 16 and 17, 1958. The order of Railroad Telegraphers, hereinafter referred to as "Telegraphers", appeared as a protestant to the granting of this application.

On May 9, 1958, the South Dakota Commission entered its order in this matter (Order No. F-2499) wherein it was ordered

"that the Chicago and North Western Railway Company be, and is hereby, authorized and directed to forthwith inaugurate and put into effect its proposed central agency station plan . . ."

Among the findings of the Commission were the following:

"3. That the agent's work load as shown by statistics of record at subject stations varies from 12 minutes per day at Farmer to 2 hours per day at Onida, with an average work load of 50 minutes per station at the 69 subject stations.

"4. That the maintenance of full-time agency service of 8 hours per day, 5 days a week, at full time pay is not required by public convenience and necessity at each one of the subject railroad stations and part-time service will avoid closing the stations completely.

"5. That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates, and that an order be forthwith issued that the proposed central agency plan be effectuated."

Similar petitions seeking authority to place into effect the central agency plan were filed with the Iowa Commission on January 24, 1958, with the Minnesota Commission on January 24, 1958 and with the Wisconsin Commission on April 14, 1958. Each of these Commissions authorized the plan to be put into effect; the Iowa Commission on August 11, 1958, the Minnesota Commission on November 12, 1958 and the Wisconsin Commission on January 20, 1959. North Western began putting the central agency plan into effect in South Dakota on May 14, 1958.

On December 19 and 23, 1957, the Telegraphers served notice on North Western under Section 6 of the Railway Labor Act, requesting that existing col-

lective bargaining agreements be amended by adding the following provisions:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the Carrier and the Organization."

It should be noted that this notice was served approximately six weeks after the application to effect the central agency plan had been filed with the South Dakota Commission and after two hearings had been held by that Commission. What the Telegraphers sought to obtain was a veto power in the event the Commission granted the application of North Western.

North Western did not consider this provision to be legally within the scope of Section 6 of the Railway Labor Act. After certain fruitless mediation and arbitration procedures, North Western was confronted with the threat of a strike and sought injunctive relief, which has led to the presentation of the case to this Honorable Court.

If the requested contractual provision had been agreed to, it would put the Telegraphers in a position to prevent the abolition of any station agency or the inauguration of the central agency plan. This would have the necessary effect of completely nullifying the orders of the state regulatory commission issued in regard to these matters in the public interest.

The issues involved in this case are of great importance to the state regulatory commissions and to the general public of the respective States, for they involve the question of whether the Congress of the United States intended that the police powers of the states exercised in regulating transportation agencies in the

interest of the public should be thwarted by private contractual agreements under the Railway Labor Act.

### STATEMENT OF POSITION.

It is the position of this Association that orders of a state regulatory commission issued in the public interest may not be thwarted by private contractual agreements under the Railway Labor Act.

### ARGUMENT

It is a basic tenet of public utility regulation that private contract rights must give way before regulation in the public interest.

In *Nebbia v. New York*, 291 U. S. 502, 523, this Court stated:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

In *Manigault v. Springs*, 199 U. S. 473, 480, this Court stated:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are nested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may

thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people; and is paramount to any rights under contracts between individuals."

With reference to regulation of utility rates under a state public utility act, this Court stated in *Midland Realty Co. v. Kansas City P. & L. Co.*, 300 U. S. 109, 113:

"But the State has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them. . . . It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the Commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature."

Utility contract rights have continuously been held to be subject to the power of the legislature or to its authorized delegate, in this instance the public utilities commission. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467; *Producers Transport Co. v. Railroad Commission*, 251 U. S. 228; *Union Dry Goods Co. v. Georgia Public Serv. Corp.*, 248 U. S. 372.

As stated by the Circuit Court in the instant proceeding:

"A carrier may not escape its obligations by bargaining them away. The Commission orders

may not be circumvented by a contract entered into by a carrier and a union under threat of strike."

It is axiomatic that such a premise exist. For if that were not the case, the power of the legislature and its delegate, the public utilities commission, would be reduced to a nullity and the commission form of regulation so evident in this country would be without foundation.

This being true, the question then becomes: Did the Congress of the United States intend to circumscribe the exercise of state regulatory authority in the field of station agencies through the enactment of the Railway Labor Act or is the Railway Labor Act to be interpreted as consistent with the wishes of Congress? If the latter is the case, the machinery of the Railway Labor Act would be applicable to matters wherein the carrier had the volition to contract and would not serve to circumvent regulatory orders of a state commission.

In *Missouri Pac. R. Co. v. Norwood*, 42 F. 2d 765, aff'd 283 U. S. 249, it was contended by the carriers that the Missouri Full Crew Law was invalid because it related to "working conditions" under the Railway Labor Act, a field preempted by the Congress of the United States. The District Court stated:

"They ('working conditions' under the Railway Labor Act) mean such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees. This could not include matters of statutory duty, for such are withdrawn from the volition of either party."

In the case of *In Re Chicago North Shore and Milwaukee R. Co.*, 147 F. 2d 723, cert. den. 325 U. S.

852, there was a dispute between employees of the Chicago North Shore and Milwaukee Railroad and the employees of the Chicago Rapid Transit Company as to which employees should operate the trains of the former from the city limits to a downtown terminal. The employees of the North Shore contended that they had a contract to conduct such operations. The Illinois Commerce Commission had approved a contract between the two carriers providing for part of the operation to be performed by employees of the Rapid Transit Company. The employees of the North Shore contended that the Commission order was invalid inasmuch as the operations were a subject for negotiation under the Railway Labor Act. The Court of Appeals rejected this contention:

“(3) The Act does not undertake governmental regulation of working conditions, *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6, 63 S. Ct. 420, 87 L. Ed. 571, nor have we been able to find in the Act an intention to exclude a state from exercising its police power or the right to approve or disapprove the terms and conditions upon which one carrier might allow another carrier to use the former's property or facilities.

“(4) The Illinois Public Utility Act contemplates actual supervision of every public utility so that continuous, adequate, uniform satisfactory service shall be rendered to the public, *City of Chicago v. Alton R. R. Co.*, 355 Ill. 65, 74, 188 N. E. 831, and requires that intercorporate contracts providing for the use by one rail carrier of tracks and facilities of another carrier be approved by the Illinois Commerce Commission. Ill. Rev. Stat. 1943, Chap. 111-2/3, § 27.

“(5, 6) The phrase ‘working conditions’ means such conditions affecting the work of the employees

as might be the subject of agreement between North Shore and its employees, *Missouri Pac. R. Co. v. Norwood*, D. C., 42 F. 2d 765, 773, affirmed, 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010. The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work required of employees. It does not exclude a State from exercising its police power. *Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen*, supra, 318 U. S. 6, 63 S. Ct. 420, 87 L. Ed. 571."

The decisions in these cases certainly seem controlling of the issues in the instant proceeding.

The brief of Petitioners contend that this issue presents a conflict between the orders of the State regulatory commissions and intent of Congress as embodied in the Railway Labor Act. This is not the case. The Congress has knowingly and consciously left the regulation of station agencies to the state commission.

Federal legislation preempting the regulation of railroad rates and service of a local nature had its genesis in the Transportation Act of 1920. The enactments to Section 13 of the Interstate Commerce Act at that time, however, related only to local rates and Congress chose to leave the regulation of local service matters to the state commissions.

Throughout the hearings before Congressional committees which proceeded the passage of the Transportation Act of 1920 no one discussed the provisions of Section 13 in terms of anything but rates and no one asked that the police powers of the States be otherwise interfered with. In hearing before the Newlands Committee (reported as a part of the hearings before the

Senate Committee on Interstate Commerce upon Extension of Tenure of Government Control of Railroads, 65th Congress, 3d Session) Mr. Julius Kruttschnitt, Chairman of the Executive Committee, Board of Directors of the Southern Pacific Company made a statement, from which we quote:

“Mr. Kruttschnitt: There is a control of certain expenses that I do not see how you can take out of the hands of the States—that is, as to these local matters. I enumerated the demands made upon us for useless stations as one of the handicaps we labor under.

“Mr. Sims: Why can't that power now exercised by the States be taken out and placed under the control of the Federal government, as well as any other power exercised by the States?

“Mr. Kruttschnitt: Theoretically, it could, but I don't suppose the Federal government would be very familiar with the facts, we will say, at Fair Oaks station, in California . . . It seems to me I can answer your question best by comparing the condition of the carriers to a man who, perhaps, has a very severe or very bad carbuncle and corns that interfere with his powers of locomotion and sitting down, and might also have a small pimple on his cheek. It would interest him more to get rid of the carbuncle and corns and let the pimple take care of itself. In other words, he can stand it. The carriers, if they can have one power to take care of their revenues, which is their life—their 100 per cent—they could very well leave the control of certain of their expenses, amounting to a small fraction of the revenue, in the hands of the States, where it is now . . . I should think then it was entirely within their power (the Congress) and proper that they should say, ‘While we have the right to take over everything—rates, taxes, road crossings, and new stations—we do not think, in

the public interest, that it is necessary to do that.' Could they not say, 'We think that these evils, or most of them, can be corrected by our turning over to the National government the power of regulating revenues and of passing on security issues, and fixing rates generally and we leave to the States everything else?' " (pages 977, 978, 980, 981).

In each of the bills leading up to the Transportation Act of 1920 there was a provision for amending Section 13 of the Act by adding language giving the Commission power over intrastate rates in certain circumstances.

In the hearing before the House Committee on Interstate and Foreign Commerce on H. R. 4378—66th Congress, Mr. R. S. Lovett, President of the Southern Pacific Railroad Co., then arguing for an extension of Federal control to State rates, said:

"I do not advocate the abolition of the State commissions. There are many important functions for them to perform . . . the ordinary police power of the States with respect to railroads, not involved in the matter of rates and through service, could be left to them . . ." (p. 1313).

At the same hearing, Mr. Alfred P. Thom, General Counsel of the Railway Executives Advisory Committee testified with regard to the proposed Section 13 in H. R. 4378:

"Mr. Thom: . . . it is essential that you do confine what you propose to a supervision of the discriminatory character of rates, but that you should also extend it so as to provide for the case of undue inequality of rates, . . .

"Mr. Hamilton: You propose practically to do away with the functions of the State commission except as to the exercise of the police power.

"Mr. Thom: Only as to rates . . ." (pp. 2996-2997).

The whole legislative history of the Transportation Act of 1920, while preempting the field as to intrastate rates under certain circumstances, clearly shows the intent of Congress to leave matters of railroad service to local state regulation.

This situation remained unchanged for 38 years, until the enactment by Congress of the Transportation Act of 1958. Here again it is evident that Congress knowingly and willingly left the regulation of station agencies to the state commissions.

The Transportation Act of 1958 added a new section 13a to the Interstate Commerce Act empowering the Interstate Commerce Commission with certain jurisdiction over discontinuance of passenger trains and ferries. The final enactment did not however grant the ICC any jurisdiction over "station, depot or other facility" which had been the language contained in the legislation as introduced.

From January to April, 1958, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce held a series of hearings on "Problems of the Railroads." One of the state regulatory commission witnesses at these hearings was Commissioner Alan S. Boyd of the Florida Railroad and Public Utilities Commission, who presented for the record statistical summaries on passenger train discontinuances and on station agency discontinuances approved or denied by state commissions

for 1951-56 (pp. 221-224). The latter summary showed that in the period 1951-56 inclusive, the state commissions had approved station agency discontinuances in 2466 instances and denied them in 372 instances.

Another state regulatory commission witness was Commissioner John M. Ropes of the Iowa Commerce Commission (pp. 1815-1828). Referring to dualization of station agencies, Commissioner Ropes testified:

“Consolidation of some rail services should be made rather than the discontinuance of such service altogether. The Minneapolis and St. Louis Railway Co. has initiated a program in Iowa and surrounding States providing for dualization of agency service in some of the smaller communities located on its line. Other carriers are doing likewise. Briefly, this program provides for 1 man handling the railroad business of 2 or more small communities. Where the program has been inaugurated with the authority of the State commission the people of those communities have been satisfied with the service, and the railroads have made a substantial savings.”

...  
“For example, the Minneapolis & St. Louis Railway Co., and the Chicago-Northwestern Railway Co. has operated in the Midwest, and I imagine surrounding areas, programs to dualize agency service.

“Briefly, this program is one where 1 agent handles the railroad business at 2 or more small communities. We have found where the program has been inaugurated with the permission of the State commission, the people of the communities have been satisfied with the service and the railroads have made substantial savings.”

Another witness who opposed any transfer of state commission jurisdiction over station agencies to the Interstate Commerce Commission was Mr. G. E. Leighty, Chairman of the Railway Labor Executives' Association (pp. 1985-2038). Mr. Leighty testified:

"The railroads have abandoned entirely too many stations and cut out too much service already, for their own good. State commissions have gone too far in authorizing these cuts. Information on the record of the State commissions was submitted in detail in the Interstate Commerce Commission inquiry into the Railroad Passenger Deficit Problem (ICC Docket No. 31954).

"Mr. Walter R. McDonald, Chairman of the Passenger Deficit Committee of the National Association of Railroad and Utilities Commissioners submitted tables summarizing the actions of State commissions on both abandonments and discontinuances for the 6-year period, 1951-56. In that period, railroads throughout the country requested the abandonment of 2,838 stations. State agencies granted 2,466 of these requests—87 percent of the total. In the same period the carriers requested approval to discontinue 1,471 trains. State commissions granted 1,274 of these requests—86.5 percent of the total."

The information to which Mr. Leighty referred in ICC Docket No. 31954 was the same information which had been placed in the record of the Senate hearings by Commissioner Boyd and referred to above. The following exchange of conversation took place between Mr. Leighty and Senator Purtell:

"Senator Purtell: You want it left in these States even though you tell me that some State

agencies have permitted the railroads to do as they will?

"Mr. Leighty: That's right."

Following these hearings, there was introduced in the Senate S. 3778 embracing the recommendations of the Subcommittee on Surface Transportation growing out of testimony received at the hearings. S. 3778 contained the language "station, depot or other facility" as being among the matters which would be transferred from State to Federal jurisdiction.

During the debate on the floor of the Senate, Senator Neuberger offered an amendment to this portion of the bill (Cong. Rec. p. 10864):

"My amendment would amend lines 6, 14 and 20 on page 6, in section 4 by inserting the word 'or' between the words 'train' and 'ferry' and striking the words 'station, depot or other facility'.

"The essential purpose of the amendment is to leave these particular items under State jurisdiction, as they are at present."

Senator Smathers, sponsor of S. 3778, indicated acceptance of this amendment with the understanding that it would be perfected in conference. The Senate agreed to the Neuberger amendment (Cong. Rec. p. 10864).

In the House of Representatives a companion bill to S. 3778 was introduced, namely H. R. 12832. This bill included the same language as S. 3778 regarding "station, depot or other facility," but the House Committee on Interstate and Foreign Commerce, in reporting the bill, deleted this language. The Committee stated:

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." (H. Rept. No. 1922, p. 12)

In the course of the debate on the floor of the House, Congressman Harris, sponsor of H. R. 12832, stated:

"The abandonment of stations and depots is left with State Commissions. So you can see that practically all of this problem of abandonment is continued with the State Commission, as it has been in the past. The Congress has never preempted that authority." (Cong. Rec., p. 12530)

H. R. 12832 passed the House in the form recommended by the Committee, without the language "station, depot or other facility."

S. 3778 and H. R. 12832 went to conference and the conference committee accepted the House version of the bill on this question. All reference to "station, depot or other facility" was deleted from the conference-reported bill. The conference report passed both the Senate and the House and became Public Law 85-625, known as the Transportation Act of 1958.

This study of the legislative history clearly indicates that Congress has carefully considered the matter of state jurisdiction over station agencies and has knowingly and willingly left jurisdiction over such facilities with the state regulatory commissions.

The question then is not one of a conflict between a federal statute (the Railway Labor Act) and the action

of a state commission but rather of interpreting the intent of Congress in its conscious choice of authorizing both actions. The answer should be to achieve a compatible interpretation of both expressions of Congress so as not to force an irreconcilable conflict. If the term "working conditions" in the Railway Labor Act is held to embrace such subjects of agreement as are within the volition of either party, and not to include matters of statutory duty, then such an end can be accomplished.

### CONCLUSION

This Association does not believe that Congress intended that orders of a state regulatory commission concerning station agencies could be thwarted by private contractual agreements under the Railway Labor Act. Accordingly, we urge that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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December 28, 1959

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Office-Supreme Court, U.S.

**FILED**

**DEC. 28 1959**

**JAMES R. BROWNING, Clerk**

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1959**

**THE ORDER OF RAILROAD TELEGRAPHERS, et al.,**  
***Petitioners,***

***v.***

**CHICAGO AND NORTH WESTERN**  
**RAILWAY COMPANY,**

***Respondent.***

**On Writ of Certiorari to the**  
**United States Court of Appeals for the Seventh Circuit**

**BRIEF OF BUREAU OF INFORMATION OF EASTERN RAIL-**  
**WAYS, THE ASSOCIATION OF WESTERN RAILWAYS,**  
**AND BUREAU OF INFORMATION OF SOUTHEASTERN**  
**RAILWAYS AS AMICI CURIAE**

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1959

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No. 100

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THE ORDER OF RAILROAD TELEGRAPHERS, *et al.*,  
*Petitioners,*

*v.*

CHICAGO AND NORTH WESTERN  
RAILWAY COMPANY,

*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

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BRIEF OF BUREAU OF INFORMATION OF EASTERN RAIL-  
WAYS, THE ASSOCIATION OF WESTERN RAILWAYS,  
AND BUREAU OF INFORMATION OF SOUTHEASTERN  
RAILWAYS AS *AMICI CURIAE*

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The Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways submit this brief as *amici curiae* in support of the position of the respondent that the judgment of the court of appeals be affirmed. The consent of the attorneys for both the petitioners and the respondent has been obtained and is submitted herewith in accordance with Rule 42 of the Rules of this Court.

### The Interest of *Amici Curiae*

*Amici curiae* are the Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways, unincorporated associations of the majority of the carriers by railroad that employ persons defined as "employees" in Section 1 Fifth of the Railway Labor Act (45 USC § 151 Fifth.) The members of these associations are subject to the Railway Labor Act, for each of these railroads is a "carrier" within the meaning of Section 1 First of the Railway Labor Act (45 USC § 151 First).

The railroads here represented by *amici curiae* are constantly involved in labor negotiations, so that the instant case is of special significance to them. Although the facts in this case may make a broad decision unnecessary, *amici curiae* feel that the Court should be apprised of the effect its decision could have in the entire field of railroad labor relations.

*Amici curiae* believe that the petitioners' demand, which would give Telegraphers a veto right over the abolition and consolidation of station agencies, is not a subject of compulsory bargaining under the Railway Labor Act, but is rather a subject to be regulated in the public interest. If the decision below is reversed, similar demands by petitioner and other labor organizations on railroads represented by *amici curiae* would serve to prevent the modernization of all railroads and the abandonment of wasteful operations with the approval of state and federal regulatory agencies pursuant to the National Transportation Policy embodied in the Interstate Commerce Act.

It is important to the railroads and the general public that the Railway Labor Act be enforced and that the costly strikes which that Act is designed to prevent be avoided.

If the decision below is reversed, the employees of the railroads will be encouraged to conduct strikes to enforce non-bargainable demands in the future, secure in the knowledge that the strikes will be financed out of the Railroad Unemployment Insurance Account established by the Railroad Unemployment Insurance Act (45 USC § 351 *et seq.*). Unlike other industries, railroad employees on strike are eligible for unemployment compensation unless the strike was called in violation of the Railway Labor Act. The obvious advantage in bargaining power which this gives to railroad labor organizations makes the scope of required collective bargaining under the Railway Labor Act a matter of concern to all carriers. Moreover, since the railroads are subject to the taxes which finance the insurance under the Railroad Unemployment Insurance Act, they would be financially affected by any depletion of the Railroad Unemployment Insurance Account.

### Questions Presented

1. Is a railroad labor organization's demand for a veto over the abolition of positions a required subject of bargaining under the Railway Labor Act where the demand is designed to frustrate a plan for coordinating station agencies which has been approved by state regulatory commissions?

2. Is a strike called for the sole purpose of enforcing a demand that is nonbargainable under the Railway Labor Act protected by the Norris-La Guardia Act?

Certain other questions have been raised by petitioners in their brief, such as the right of a union to strike during mediation and for thirty days thereafter, and the propriety of an injunction pending appeal in a case in which the applicability of the Norris-La Guardia Act is disputed. Although *amici curiae* do not believe these questions are

appropriately presented in this case, some of them are discussed briefly herein. See pp. 50-55 *infra*.

## Summary of Argument

### I

Petitioners' demand for a veto over the abolition of positions is not a subject for mandatory collective bargaining under the Railway Labor Act. Modern labor management relations contemplate two major areas of decision which are not governed by collective bargaining. One area relates to internal relations of employees and their representatives. Contract proposals by which employers seek to have a voice in this area have been held to be beyond the scope of mandatory collective bargaining. On the other hand, an area in which management has a right of decision subject to public regulation but unhindered by collective bargaining is equally well recognized, even by spokesmen of organized labor.

A. The duty imposed on employers and employees to bargain under the Railway Labor Act is not unlimited. Required subjects of bargaining are those that relate to "rates of pay, rules, and working conditions." Petitioners' argument that any contract proposal must be bargained about is unsupported by the legislative history of the Railway Labor Act and would render meaningless the frequent references in the Act to "rates of pay, rules, and working conditions." Petitioners' contention is also contrary to the General Purposes of the Act stated in Section 2. 45 USC § 151a. The failure of Congress to create an administrative agency like the National Labor Relations Board to enforce the duty to bargain collectively under the Railway Labor Act does not mean that that duty is unenforceable or indefinable. The federal courts can and have enforced and defined that duty, without being unduly bur-

dened by litigation. Federal courts have frequently recognized that carriers are free to make certain decisions unrelated to rates of pay, rules, and working conditions without bargaining for the consent of labor organizations.

B. The petitioners' demand would force respondent to violate the national transportation policy which seeks to avoid waste and to promote efficiency in transportation. The legislative history of the Transportation Act of 1940 reveals that Congress wished to promote efficiency by encouraging consolidations even though employees were displaced thereby, provided that displaced employees were given some fair protection. The present case involves a consolidation of station agencies. Control over abandonment or consolidation of stations pursuant to this national policy of avoiding waste was specifically left by Congress with the states when it considered the Transportation Act of 1958. Respondent's plan for consolidating station agencies was approved by state regulatory commissions after hearings in which petitioners were allowed to present objections. These commissions found that there was a negligible amount of work at the individual stations respondent proposed to combine and therefore the maintenance of full time agency service at these stations would dissipate respondent's revenues and impair its capacity to render adequate service to the public.

Petitioners' demand is therefore like an attempt by a labor organization to compel a carrier to violate a national policy against discrimination in employment. Such a demand does not come within the realm of legitimate collective bargaining. A demand may be nonbargainable for this reason even though agreement to such a demand by the other party would not be illegal.

C. The abandonment of station agencies has historically been a matter for state regulation and not a subject for collective bargaining. The contracts cited by petitioners as precedent are different in purpose and effect from the proposal at issue. Petitioners' attempt to obtain a veto over the abolition of positions is quite different from contracts calling for consultations between management and labor prior to changes in operations. The veto is unqualified and could be used to prevent the abolition of a position even though it was proved that the position was unneeded and business conditions required its elimination.

The veto has nothing to do with various means whereby unions are given a voice in the distribution of existing job opportunities. Such provisions as those relating to seniority or work-sharing assume a right in management to decide what jobs are necessary because those provisions only govern the question who are to fill such jobs. Guaranteed annual wage agreements to promote stable employment in industries with seasonal fluctuations in employment do not prevent the abolition of permanently unneeded jobs, and are also unlike petitioners' proposal.

Severance pay for employees permanently displaced by operational and technological changes is concededly bargainable and has been offered to petitioners by respondent. Respondent has also offered to negotiate an agreement limiting lay-offs of employees. Such measures relate to the impact of changes on employees, either by cushioning the impact or by preventing displacement of present employees. They do not prevent normal attrition in unneeded jobs. Petitioners' demand, however, does not concern the effect of changes on employees. The veto which they seek could prevent the abolition of a position even though no employee

was affected thereby, either because the present holder of the position had retired or quit or was transferred to a newly created job.

Even if there were historical precedent for a proposal like petitioners', it would not necessarily be bargainable unless it fell within the statutory definition and did not violate national policies.

## II

Petitioners' strike was called for the sole purpose of compelling respondent to submit to a demand beyond the scope of mandatory bargaining under the Railway Labor Act. Therefore the strike is not protected by the Norris-LaGuardia Act, which must be accommodated to the purposes of the Railway Labor Act. Petitioners' strike to obtain a nonbargainable demand was accompanied by a refusal to discuss any of the alternatives for protecting employees which were suggested as subjects for negotiation by respondent. Such insistence on a nonbargainable proposal constitutes a refusal to bargain. The Railway Labor Act imposes the duty on both carriers and employees to bargain over rates of pay, rules, and working conditions and violation of this duty is subject to injunction. Just as an employer may be ordered to stop insisting on a nonbargainable proposal as a condition to entering a contract, a union may be required to forego resort to a strike to compel submission to a nonbargainable demand.

The decision below does not restrict the legitimate interests of labor. In disputes such as the present one which involve initial management decisions subject to public regulation, reasonable alternatives to a strike are available to protect employees. Labor organizations can and in the present case petitioners did appear before the appropriate regulatory agencies to oppose changes for which carriers

are seeking approval. If, after considering the interests of employees, an administrative tribunal approves a change, labor organizations may also bargain over ways to curtail adverse effects on employees. Respondent has offered to discuss such matters as severance pay and even a limitation on lay-offs of employees.

### III

Any issue as to the right to strike for 30 days after the National Mediation Board has terminated its services has become moot in this case. However, petitioners' argument that the prohibitions of Sections 5 First and 6 of the Railway Labor Act apply only to carriers must be answered. The legislative history of the Railway Labor Act and the consistent practice thereunder demonstrate that strikes pending mediation were banned. The National Mediation Board so recognizes. Judicial decisions have also uniformly held that strikes over major disputes may not be commenced until the procedures of the Railway Labor Act have been exhausted.

### IV

The propriety of the injunction pending appeal need not be decided. In any event, when the applicability of the Norris-La Guardia Act is seriously disputed, a district court has power to enjoin a strike pending a final decision on the question of its jurisdiction.

#### **I. THE PETITIONERS' DEMAND IS OUTSIDE THE SCOPE OF MANDATORY COLLECTIVE BARGAINING UNDER THE RAILWAY LABOR ACT.**

Purporting to follow the procedural requirements of

Section 6 of the Railway Labor Act (45 USC § 156) for the service of notice of "an intended change in agreements affecting rates of pay, rules, or working conditions," on December 23, 1957, the Order of Railroad Telegraphers (Telegraphers) served upon the Chicago and North Western Railway Company (North Western), notice of their desire to add the following to the agreement between the parties:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

This demand presents the issue whether an unqualified veto power over the abolition of positions on the North Western is a bargainable matter under the Railway Labor Act.

*Amici curiae* insist that the Telegraphers' demand does not come within the scope of mandatory collective bargaining under the Railway Labor Act. It is comparable rather to a request for prior approval from a labor organization before a particular train or branch line can be discontinued or a railroad yard closed. The duty imposed on employers and employees to bargain collectively under the National Labor Relations Act and the Railway Labor Act contemplates a division of modern labor-management relations into three major areas of decision. *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F.2d 34 (C.A. 4, 1957), certiorari denied, 355 U.S. 914. In one area, management has "the right and the power to make certain decisions without prior consultation with the representatives of the employees and to effectuate them in practice without the delay inherent in extended collective bargaining procedures." 248 F. 2d at p. 41. In a second area are those decisions properly made by joint agreement

between management and labor—decisions on “wages, hours of employment, seniority rights, grievance procedures, and similar matters.” 248 F. 2d at p. 42. In a third area are decisions “made solely by the representatives of the employees or the membership of the organization, which, like the decisions of management in the first area, are not the proper business of the other party. *Idem*. Labor is thus protected in the administration of affairs that are properly its sole concern.

This Court recently emphasized this protected area of labor relations in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342. In that case an employer insisted on a “ballot” clause requiring a secret vote of the employees before a strike could be called. In discussing the duty of employers and employees under the Taft-Hartley Act to bargain over “wages, hours and other terms and conditions of employment,” the Court stated that:

“The duty is limited to those subjects. . . . As to other matters, however, each party is free to bargain or not to bargain. . . .

“Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether either the ‘ballot’ or the ‘recognition’ clause is a subject within the phrase ‘wages, hours, and other terms and conditions of employment’ which defines mandatory bargaining. The ‘ballot’ clause is not within that definition. It relates only to the procedure to be followed by the employees among themselves. . . .” 356 U.S. at pp. 349-350.

Unlike a no-strike agreement, which is bargainable because it “regulates the relations between the employer and the employees, . . . the ‘ballot’ clause . . . deals only with relations between the employees and their union.” 356 U.S. at p. 350.

Likewise in *Iron Castings, Inc.*, 114 NLRB 739, enforced, 237 F. 2d 344 (C.A. 5, 1956), a company's proposed clause governing the composition of the employees' grievance committee was held to be nonbargainable. "Respondent's insistence on the imposition of its ideas as to the composition and method of choosing the employees' shop committee was an attempt to participate in a right reserved exclusively to its employees under the Act." 114 NLRB at p. 744. Similarly in *National Labor Relations Board v. Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5, 1951), a request that a union register under a state law so as to be amenable to suit was held to be "outside the area of compulsory bargaining." And in *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85 (C.A. 4, 1956), it was held that an employer was not entitled to insist that the collective bargaining contract, when executed, must be ratified by a secret vote of all the employees represented by the union, even though such a provision if agreed to by the parties would be valid. Accord, *National Labor Relations Board v. Corsicana Cotton Mills*, 178 F. 2d 344 (C.A. 5, 1949).

Conversely, certain decisions relating to the conduct of the business are a function of management, subject to the rights of the general public in regulated industries such as transportation. With reference to decisions in the management areas, the court in the *Norfolk & Portsmouth* case said (248 F. 2d at pp. 41):

"Among the decisions generally regarded as falling within this class are the type of product to be produced, the location of plants, the installation of new machinery and equipment and similar matters. All of such decisions when effectuated have a resultant effect upon working conditions and are of interest to employees and their representatives. They are none the less re-

garded as being within the prerogative of management alone to decide and effectuate in the first instance."

The court stated the reasons why certain decisions must be made by management alone (248 F. 2d at p. 42.):

"The generally recognized differences in the nature of the several classes of decision and the appropriate means of effectuating each are founded upon important considerations. The installation of new machinery, for instance, is a decision which management should be more qualified to make than the representatives of employees. The making of the decision and its effectuation, without delay, may be imperative if competitive conditions are to be met and the interest of both employer and employees are to be served in the long run."

The area reserved for unilateral management decisions has also been recognized by the representatives of organized labor. Arthur J. Goldberg, General Counsel for the United Steel Workers, at the Ninth Annual Meeting of the National Academy of Arbitrators, stated:

"Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has the right to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have that improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute." *Management Rights and the Arbitration Process* (1956) p. 123.

Decisions of the War Labor Board on the function of management rights under collective bargaining are persuasive, since they reflect the accumulated experience of the expert representatives of management, labor and general public during the years 1942-1945. See Teller, *Management Functions under Collective Bargaining* (1947) p. 28. In *Federal Shipbuilding & Drydock Co.*, 21 War Lab. Rep. 121 (1945), the Board rejected the union's request for a rule:

"... That any substantial reduction in number of employees on a shift cannot be effectuated except by mutual agreement. This has been denied for the fairly obvious reason that we believe it is still a management prerogative to determine the size of its work force and to determine whether a particular type of shift operation is necessary. There can be no doubt that good labor relations require discussion with the union when any major change in number of shifts or employment on a particular shift is in prospect. However, to make any such change contingent on mutual agreement is another matter."

See also *John F. Trommer, Inc.*, 23 War Lab. Rep. 117 (1945); *New York, New Jersey Milk Distributors*, 27 War Lab. Rep. 66, 72-73 (1945).

These considerations have been reflected in federal labor legislation defining the duty of labor and management to bargain collectively. Under the Taft-Hartley Act employers and employees must bargain "with respect to wages, hours, and other terms and conditions of employment." 29 USC § 158 (d). As we have seen, employees have no duty to bargain collectively over management proposals that relate to internal affairs of the union. Similarly, the duty of employers to bargain collectively is not unlimited. Among the demands of unions which have been held to be outside the scope of collective bargaining, are the rentals charged

for company housing, *National Labor Relations Board v. Bemis Bros. Bag Co.*, 206 F. 2d 33 (C.A. 5, 1953); general legislative policies (advocacy of child labor law), *Globe Cotton Mills v. National Labor Relations Board*, 103 F. 2d 91 (C.A. 5, 1939); disciplinary measures applied to strikers engaged in misconduct, *National Carbon Division*, 100 NLRB 689, 694 (1952); and the employment terms offered to replacements for union members on strike, *Times Publishing Co.*, 72 NLRB 676, 684 (1947).

An employer under the Taft-Hartley Act need not consult with the union over decisions relating to the operation of his business. In *Krantz Wire & Manufacturing Co.*, 97 NLRB 971, 988 (1952), an employer was held to be entitled to close his plant and discharge his employees for business reasons without any prior consultation with the union.

"The complaint alleges, as one of the grounds of the refusal to bargain, the closing of the plant by Krantz on or about July 21, 1950, 'without notifying or consulting the Union.' It has already been found that Krantz closed his plant and discharged his employees because of a bona fide transfer of his plant and equipment, and not as part of any scheme for evading his obligation to bargain with the Union. An employer is free to close his plant and discharge his employees for any reason or for no reason at all, provided only that he does not do so with the purpose of discouraging or encouraging union membership, or otherwise interfering with the exercise by his employees of the rights guaranteed in Section 7 of the Act. Where he closes his plant for legitimate business reasons the Act does not require that he consult with his employees' representatives as a prerequisite to going out of business."

Accord: *Walter Holm & Co.*, 87 NLRB 1168, 1172 (1949). An employer is also free to move his operations to a new location without bargaining for the consent of the union.

*Auto Stove Works*, 81 NLRB 1203 (1949); *Mount Hope Finishing Co. v. National Labor Relations Board*, 211 F. 2d 365, 374 (C.A. 4, 1954).

In *Penello v. International Union, UMW*, 88 F. Supp. 935, 940-943 (D.D.C., 1950), a union proposal for a contract clause which would effectually give the union the power to control production and prices was held to be beyond the scope of collective bargaining.

**A. The Duty to Bargain Collectively under the Railway Labor Act Is Not Unlimited.**

The duty of railroads and their employees to bargain collectively under Section 2 First (45 USC § 152 First) of the Railway Labor Act is also limited in scope. Carriers and employees are required to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions \* \* \*."

Petitioners seem to think that the words "rates of pay, rules, and working conditions" in the Railway Labor Act, (see § § 2, 2 First, 2 Sixth, 2 Seventh, 3 First (i), 5 First, 5 Third (e), and 6) are just excess verbiage because they claim carriers and unions have a duty to bargain over "all disputes" whether or not they relate to rates of pay, rules, or working conditions. Petitioners' desire to avoid having to show that their proposal has anything to do with working conditions is certainly understandable. But the argument that there is no limit to the subjects of collective bargaining under the Railway Labor Act is fallacious.

As the brief of the Railway Labor Executives' Association (RLEA) points out (Br. 21), the "all disputes" language in Sections 2 First and Second of the present Railway Labor Act was derived from Section 301 of the Transportation Act of 1920 which stated that "all disputes"

between carriers and employees were first to be considered in conference. The last sentence of this Section stated that "If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." 41 Stat. 469. Therefore the disputes to which Section 301 refers are the different kinds of disputes coming within the jurisdiction of the various boards set up by the 1920 Act. The "all disputes" language means only that regardless of the kind of dispute, it shall be considered in conference prior to invoking the appropriate board for the particular type of dispute.

Section 302 provided for railroad boards of labor adjustment, set up by agreement, which were to "decide any dispute involving only grievances, rules or working conditions" not decided in conference. 41 Stat. 469-470. The Railroad Labor Board, a body appointed by the President, was given jurisdiction in Section 307 over "all disputes with respect to wages or salaries of employees" not decided in conference. 41 Stat. 470-471. We thus have in the 1920 Act the first distinction between major and minor disputes, with different procedures for handling each after the initial stage of negotiation. The last sentence of Section 301 *supra* states that all disputes not resolved in conference must be handled by the procedures set up in the Act. No procedure was formulated for a "dispute" having nothing to do with "wages or salaries" or "grievances, rules or working conditions." Section 301 therefore contemplated that all disputes would fall into one of these two categories. In the same way, when the idea behind Section 301 was carried over into Section 2 of the Railway Labor Act of 1926, the

intent was that "all disputes" (a shorthand way of covering both major and minor disputes) should be considered in conference before the Mediation Board or the Adjustment Board began to operate. The intent was not that carriers had to bargain over anything under the sun, including the employment of Negroes, the closing of a yard, or of a station. If that were the purpose of the language chosen, the repeated references to "rates of pay, rules, and working conditions" in the Act would be redundant.

The RLEA also relies on a reference to three classes of disputes in the House Report on the Railway Labor Act of 1926 (Br. 25) and in Section 5 First of the 1926 Act (Br. 24) which was changed in 1934. These catch-all references to "other disputes" were explained in the hearings before the House Interstate Commerce Committee by one of the principal draftsmen of the 1926 Act. The reference was intended to cover certain peculiar disputes not falling within the statutory description of either a major or a minor dispute. "Then we wanted to make it clear that there were other kinds of disagreements, such as, for example, a disagreement over the establishment of an adjustment board, a disagreement over the original agreement before any agreement was made, a disagreement over the original representation. All those types of disputes are not specifically covered in A and B, and so to have a catchall we put in C any other disputes." Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180, 69th Cong., 1st Sess., p. 71 (1926).

The present Act no longer outlines three classes of dispute in Section 5 First. It does permit invocation of the services of the Mediation Board in major disputes and "any other dispute not referable to the National Railroad Adjustment Board." 45 USC § 155 First (b). This language expands the field in which the Mediation Board

may operate but does not support petitioners' contention that the duty of collective bargaining imposed on carriers and employees is unlimited. Sometimes a question may arise as to whether a dispute is a major or a minor one, i.e., whether a party is proposing to change an agreement or is objecting to action by the other party on the ground it violates an existing agreement. Action by the Mediation Board might be appropriate in that situation because it will serve to discover the positions of both sides and thus clarify the issue. Cf. *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C.A. 4, 1957), certiorari denied, 3 U.S. 914. Similarly in the present case where the bargainability of petitioners' proposal was questioned, the Mediation Board helped to clarify the nature of this dispute. Respondent made clear its position on bargainability and suggested alternatives for negotiations on bargainable matters (R. 158). Thus the broad language of Section 5 First (b) permits invocation of the Mediation Board in situations where the nature of the dispute is not yet clearly defined. This language is consistent with the Act's express limitation of mandatory bargaining by the parties to agreements concerning "rates of pay, rules, or working conditions." The issue in this case is not the propriety of the action by the Mediation Board, but rather the duty of respondent to bargain over a proposal outside the realm of mandatory bargaining.

The RLEA suggests that the duty to bargain is unlimited under the Railway Labor Act, unlike the Labor-Management Relations Act, because Congress felt a need to avoid interruptions in transportation (Br. 19). The unstated premise in this argument is that by permitting management to interfere in the internal affairs of unions and vice versa and thereby expanding the areas of possible dispute, peaceful labor relations will be promoted. From this unsound pre-

mise the illogical result would follow that by reversing the decision below and permitting the strike Congress' policy of avoiding strikes will best be fulfilled! The General Purposes of the Railway Labor Act are set out in Section 2. They are, *inter alia*: (1) "to avoid any interruption to commerce or to the operation of any carrier," (4) "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions" and (5) "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 USC § 151a. The settlement of a dispute unrelated to grievances, rates of pay, rules or working conditions is therefore outside the purposes of the Railway Labor Act, but if such a dispute is allowed to interrupt commerce, the first purpose of the Act would be frustrated. Therefore, the decision below fully promotes all the policies of the Act.

Petitioners argue that the limits on the scope of mandatory collective bargaining set by this Court in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, are inapplicable here because "the term 'unfair labor practice' is not used in the Railway Labor Act" and the Act "establishes no such agency as the National Labor Relations Board empowered to determine what constitutes an unfair labor practice" (Br. 36). But though Congress did not call a refusal to bargain an unfair labor practice and did not set up an agency to decide what constitutes a refusal to bargain under the Railway Labor Act, the Railway Labor Act does create a duty to bargain on certain subjects and that duty is judicially enforceable. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515; *Brotherhood of Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F. 2d 36 (C.A. 4, 1953). The power to enforce the duty to bargain

must include the power to determine whether the duty has been violated, and the determination of this question can and has been made by federal courts. See cases cited pp. 22-24 *infra*. The lack of an administrative remedy to enforce rights under the Railway Labor Act does not mean these rights must be obliterated, but rather that they shall be judicially enforced. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774.

Petitioners argue that the determination of questions of bargainability under the Railway Labor Act would impose a heavy burden on federal courts (Pet. App. 55) because "railroad management has apparently adopted a widespread policy of raising the question of bargainability" (Pet. App. 53-54). Instances in which carriers have supposedly raised the issue are cited in an appendix to the "appendix" (pp. 57-63) in a misleading fashion, for a single notice is listed as many as nine times (pp. 58-59) in order to make these examples appear more numerous than they are.<sup>1</sup> There is no indication that in any of these instances (shown at pp. 57-63) the matter culminated in litigation, and thus it is difficult to see how any great burden is imposed on the federal courts. In contrast to petitioners' action in the present case, railroad labor organizations do not generally resort to strikes whenever the question of bargainability is raised. Typically, discussion on alternatives proposed by the party raising the question of bargainability leads to agreements without litigation or interruption to commerce. Moreover, the fact that courts may on occasion become involved in questions of the scope of mandatory bargaining is no reason for not enforcing the Railway Labor Act the way it was written. Despite the

1. Petitioners' description of many of the proposals to which carriers have objected is also misleading, but since none of these proposals is in issue in the present cases, it would serve no useful purpose to discuss them further herein.

existence of the National Labor Relations Board, federal courts have frequently been called upon to decide the bargainability of a proposal under the National Labor Relations Act. See, e.g., *National Labor Relations Board v. Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5, 1951); *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85 (C.A. 4, 1956); *National Labor Relations Board v. Carsicana Cotton Mills*, 178 F. 2d 344 (C.A. 5, 1949); *Globe Cotton Mills v. National Labor Relations Board*, 103 F. 2d 91 (C.A. 5, 1939); *Penello v. International Union, UMW*, 88 F. Supp. 935 (D.D.C., 1950). This "burden" on courts has not persuaded this Court to construe the National Labor Relations Act to make the scope of collective bargaining unlimited. *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342.

Far from being unlimited, the duty of railroads under the Railway Labor Act to bargain over "rates of pay, rules, and working conditions" has been held to be narrower in compass than the formula of "wages, hours, and other terms and conditions of employment" used in the National Labor Relations Act. See *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 255 (C.A. 7, 1948), certiorari denied; 336 U.S. 960; *Weyerhaeuser Timber Co.*, 87 NLRB 672, 673, note 1 (1949). The significance in the distinctive terminology of the Railway Labor Act was noted by Senator Wagner in a debate over a proposal to use the term "working conditions" in the Taft-Hartley Act. He stated (93 Cong. Rec. 3323):

"By substituting the narrower term 'working conditions' [found in the Railway Labor Act] for the present broader term 'conditions of employment' [found in the old Wagner Act], the bill would narrow the scope of collective bargaining to exclude many subjects such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee rela-

tionship, and in regard to which the employer should not have the power of industrial absolutism."

Courts have frequently recognized that the limited statutory duty to bargain in the Railway Labor Act leaves an area in which management is free to make decisions without consulting or obtaining the consent of the representatives of employees. In *In re Chicago North Shore & Milwaukee R. Co.*, 147 F. 2d 723 (C.A. 7, 1945), certiorari denied, 325 U.S. 852, the North Shore railroad agreed with the Chicago Rapid Transit lines that North Shore trains, while operating on Rapid Transit property in Chicago, should be manned by Rapid Transit Personnel. The new arrangement resulted in less work for North Shore employees, who had formerly operated the trains in Chicago as well as north of Chicago. Nevertheless, the Court held that the railroad did not have to give notice of the change and negotiate about it with the union under Section 6 of the Railway Labor Act (45 USC § 156). This "change in the intercorporate operating arrangements" of the two carriers was not a change in "working conditions" requiring prior consultation with the North Shore employees.

In *Robertson v. Atlantic Coast Line R. Co.*, 18 CCH Labor Cases, Par. 65,693 (D.D.C., 1950), the defendant railroad changed its home terminal from New York to Miami without consulting the union. Since the long stopovers for employees on the New York to Miami run were thus shifted to the latter city, the change affected workers who had established homes in New York. Nevertheless the court held the change was not one in "working conditions" requiring negotiation with the union under the Railway Labor Act. The court stated that "the location and relocation of home terminals, as well as operational

changes in schedules, seem clearly to be matters within the right of management."

In *Beeler v. Chicago, R. I. & P. Ry. Co.*, 169 F. 2d 557 (C.A. 10, 1948), an employee insisted that notice under Section 6 of the Railway Labor Act had to be served before the railroad could abolish a certain position. In rejecting this contention the court stated (p. 560):

"The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process. *Texas & N.O.R.Co v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Virginia R. Co., v. System Federation*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789. Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352 . . . It is suggested that Section 6 of the Railway Labor Act requires such notice, but that Section providing for a thirty day written notice by carriers and representatives of an intended change in agreements affecting rates of pay, rules, or working conditions, obviously has reference to matters affecting the collective bargaining process, and does not relate to matters lying outside of its scope." (Emphasis supplied)

In *New York Central R. Co. v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273 (N.D. Ohio, 1956), a strike against the closing of a yard which necessitated the lay-off of employees was enjoined. The district court held that the objection to the closing of the yard was not within the scope of mandatory collective bargaining under the Railway Labor Act and not a demand for a term or condition of employment within the meaning of the Norris-La Guardia Act. The court distinguished between the initial management decision, which was not a proper subject of collective bargaining, and the employment consequences thereof, which in that case, as here, the management was

willing to bargain about (140 F. Supp. at pp. 279-280). If the interests of the employees should require attention as a result of management action, the district court felt that then under the terms of the Railway Labor Act the parties would be required to negotiate, not with regard to the merits of the management action, but with the employment consequences thereof (140 F. Supp. at pp. 281-283). The district court stated (140 F. Supp. at pp. 279-280):

"We are of the opinion that the proposed closing of the Yard is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such a step advisable. We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its roundhouses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system."

A permanent injunction against the strike was affirmed by the court of appeals, 246 F. 2d (C.A. 6 (1957)), and this Court denied certiorari, 355 U.S. 877. In affirming, the court of appeals agreed that the union's strike against the management's decision to close the yard did not constitute a labor dispute within the meaning of either the Railway Labor or the Norris-La Guardia Acts. Therefore the railroad was under no obligation to settle or to submit to arbitration the union's protest, and the strike was enjoined to prevent interference with the railroad's duty to furnish transportation to the public.

**B. Petitioners' Demand Violates the National Transportation Policy and Concerns a Matter Left by Congress to State Regulation Under That Policy.**

In determining the scope of collective bargaining in railroad labor relations, it must be remembered that generally the management decisions outside the realm of bargaining are affected with a public interest and are subject to regulation. This factor is particularly important in the present case. The demand of the Telegraphers will operate as a barrier to fulfillment of the public duty placed on the respondent by the national transportation policy to provide economical and efficient transportation service to the public. Congress has left the implementation of this policy in regard to the operation of station agencies to regulation by the states. Petitioners' insistence that the consolidation of station agencies is within the scope of collective bargaining is inconsistent with Congress' decision that this matter should be subject to state regulation pursuant to the national transportation policy.

In *Texas v. United States*, 292 U.S. 522, 530, this Court noted that the Transportation Act of 1920 had "introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service." The Court stated (at pp. 530-533):

"It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public."

The Transportation Act of 1940, amending the Interstate Commerce Act, was designed to promote the same policy. In the 1940 Act the national transportation policy of the Congress was stated as follows (54 Stat. 899):

"It is hereby declared to be the national transporta-

tion policy of the Congress to . . . promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers:"

This Court in *Seaboard Railroad Company v. Daniel*, 333 U.S. 118, upheld an Interstate Commerce Commission order exempting a carrier from a state law, compliance with which would entail needless expense. The Court noted that (at pp. 124-125):

"Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind."

Congressional concern with efficient carrier operations was more recently reflected in the report made by the Senate Committee on Interstate and Foreign Commerce on the Transportation Act of 1958, which criticized the railroads for failing to be sufficiently interested in the elimination of wasteful duplication and nonprofitable operations. S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), p. 11.

The Interstate Commerce Act itself provides (49 USCA § 15a (2)) that:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to . . . the need, in the public interest, of adequate and *efficient* railway transportation service at the *lowest cost* consistent with furnishing such service; and to the need of revenues sufficient to enable the carriers, under honest, *economical*, and *efficient* management, to provide such service." (Emphasis added.)

In rate hearings—especially those on general increases or reductions in rates—it is not uncommon for protestants

to challenge the carriers on the question of efficient operations, and the Interstate Commerce Commission takes efficiency of operations into account, either in response to such challenges or on its own motion, in determining whether increases or decreases in rates should be ordered. See Ex Parte No. 103, *Fifteen Per Cent Case*, 1931, No. 26000, 195 ICC 5, 55 (1933); 215 ICC 439, 460-461 (1936), and Ex Parte No. 168, *Increased Freight Rates*, 1948, 272 ICC 695, 705-707 (1948); 276 ICC 9, 24-31 (1949).

In *Great Northern Ry. Co. Discontinuance of Service*, 307 ICC 59, 75 (1959), the Commission said:

"Obviously, it would be contrary to the public interest, and the expressed national transportation policy of the Congress, 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers,' if we were to require continuance of clearly wasteful and uneconomic transportation services merely to preserve jobs for employees."

Thus the national policy of promoting transportation efficiency contemplates the displacement of employees in unproductive jobs. This is clearly revealed in the legislative history of the Transportation Act of 1940. At one point a proposal was made which would have prevented approval by the Interstate Commerce Commission of consolidations of railroad facilities "if such transaction will result in unemployment or displacement of employees." This proposal was rejected by Congress as going "too far" and likely to prevent all unifications. See *Railway Labor Executives Association v. United States*, 339 U.S. 142, 150-151. Instead the Commission was given power to protect employees by ordering "fair and equitable arrangements" to protect displaced employees. Similarly the petitioners in the present case have gone too far by seeking an absolute veto on the abolition of all positions. The

decision below does not prevent the petitioners from bargaining over equitable arrangements to protect any employees who may be displaced by the abolition of a position.

It is true that the question in the present case does not involve a decision specifically governed by the Interstate Commerce Commission, since the closing of station agencies was left by Congress to state rather than federal regulation. But Congress did intend that this subject should be governed by regulation in the public interest rather than by collective bargaining. The Transportation Act of 1958 reflects Congress' strong concern over the need for the nation's railroads to promote efficiency by abandoning unprofitable and wasteful operations. Under prior law the Interstate Commerce Commission had control only over the abandonment of a line of track. The discontinuance of a train without the abandonment of the line of track over which the train operated was subject to state jurisdiction. Because of delays and refusals by state regulatory commissions to authorize discontinuance of little used services, the Interstate Commerce Act was amended to authorize the Interstate Commerce Commission to permit the discontinuance of a train. At the same time Congress decided to leave control over stations with the states.

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." H.R. Rep. No. 922,

85th Cong., 2d Sess. (1958), 2 U.S. Code and Adm. News 3456, 3468.

Jurisdiction over the discontinuance and operation of stations was thus by Congressional mandate left with state agencies. The activity of State Commissions in this field is extensive. In the period between 1951-1956 these Commissions approved 2,466 railroad station agency discontinuances and denied 372. *Idem* at p. 3477. It was this record which prompted Congress to leave jurisdiction over the discontinuance or change in operation of stations to the states. Petitioners insist that such jurisdiction now be turned over to the Order of Railroad Telegraphers instead!

In *Giboney v. Empire Storage Co.*, 336 U.S. 490, this Court upheld an injunction against picketing by retail ice peddlers to coerce a wholesaler to refrain from selling to nonunion vendors. The Court noted that:

"While the State of Missouri is not a party to this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade in one way: The appellant union members have adopted a program to regulate it another way. . . . We hold that the state's power to govern in this field is paramount, . . ." 336 U.S. at p. 504.

The issue in the present case is whether the States of Iowa and South Dakota or the Order of Railroad Telegraphers has paramount power to regulate the abandonment or consolidation of station agencies. Though Congress has left rates of pay and rules governing working conditions of railroad employees to collective bargaining, the closing of stations has been left by Congress to state regu-

lation. In this area "subject to state regulation, collective bargaining is superseded by state power. *Missouri Pac. R. Co. v. Norwood*, 42 F. 2d 765 (statutory three-judge court, W.D. Ark., 1930), affirmed, 283 U.S. 249. Petitioners quote extensively (Br. 52-54) from this Court's opinion in *Teamster's Union v. Oliver*, 358 U.S. 283, which held that state policy cannot limit "the solution that the parties' agreement can provide to the problems of wages and working conditions." 358 U.S. at p. 296. (Emphasis supplied.) But state power is inoperative only as to matters such as wages and working conditions which are within the scope of mandatory bargaining. Under the *Oliver* doctrine, state regulation in such matters is superseded regardless of which side the state regulation favors. Nothing in the *Oliver* opinion indicates that the parties' solution to a problem is paramount only if state law is less favorable to labor unions than the results achieved by bargaining. Therefore, if petitioners are correct that the consolidation of station agencies is within the area of federally required collective bargaining, respondent would have been free to adopt the central agency plan by agreement with petitioners even though the Commissions of South Dakota and Iowa had denied permission. The ultimate outcome of the plan would turn on the results of a strike, rather than on the decision of the state regulatory bodies entrusted by Congress with the governance of this subject. Such a result in a case like the present one ignores the substantial public interest in promoting efficient railroad service. In the converse situation in which a state commission decides that a particular station must be retained in the interests of public convenience and necessity, important public interests would also be subverted if the carriers and the labor organization can agree to abandon the station agency pursuant to a collective bargaining contract governing "rules and working conditions." These public interests should not be subordi-

nated to the limited interest of labor organizations in preserving sinecures for their members, particularly since the interests of labor can be protected by collective bargaining over any consequences to employees of management decisions. To permit the secondary interest of labor in these decisions to outweigh the primary concerns of the general public would be to let the tail wag the dog.

A reversal of the decision below would also have implications beyond the end of state control over the operation of stations. If the operation of a station agency is a "working condition" subject to collective bargaining unregulated in the public interest, it would follow that the abandonment of a train or of a branch line, which would also limit employment opportunities, could be made subject to the veto or approval of labor organizations rather than that of the Interstate Commerce Commission. In oral argument before the court of appeals, petitioners asserted that a veto over the discontinuance of a train was a bargainable matter. R. 384-385. In fact three of the positions abolished by respondent since December 3, 1957 (the date the proposed veto becomes effective) were abolished by reason of line abandonments ordered by the Interstate Commerce Commission (R. 296). Since labor organizations are governed only by the interests of the employees they represent, the interests of the general public would be sacrificed if control over the elimination of stations, branch lines, and trains is delegated to petitioners. See p. 37 *infra*.

For an example of such disregard of the public interest we need look no farther than the present case. The background of petitioners' demand demonstrates that it was made in an effort to preserve positions which no longer served a useful function. The waste and inefficiency of these positions which petitioners insist must be retained have been shown by the findings of the Commissions of Iowa and

South Dakota. The South Dakota Commission found that the work-load of the station agents involved "varies from 12 minutes per day at Farmer to 2 hours per day at Oida with an average work load of 50 minutes per station at the 69 subject stations." It also found that "the maintenance of full time agency service, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates." (R. 192.) The Iowa State Commerce Commission found the total hours actually worked was 17% of the duty hours of the station agents in Iowa or an average time worked of one hour and 14 minutes per day (R. 227). Not one line of petitioners' brief or "appendix" or the brief of the RLEA disputes these findings or suggests that the positions in question performed any useful function.

Petitioners' demand thus represents the antithesis of the efficient, economical railroad service required by the national transportation policy. This policy would be frustrated if abolition of positions is bargainable under the Railway Labor Act. The Railway Labor Act must be construed with other "equally important Congressional objectives" in mind. Cf. *Southern S. S. Co. v. Labor Board* 316 U.S. 31, 47-48.

In *Austin v. Painters' District Council*, 339 Mich. 462, 64 N.W. 2d 550 (1954), the Supreme Court of one of our leading industrial states held that an employer was not required to bargain over a union's demand to restrict the use of modern labor-saving devices. In the negotiations for new contracts, the painters' union demanded restrictions on pan and pressure rollers, amounting practically to a prohibition of their use. The employers refused and the trial court decreed that restrictions on pan and pressure roller equipment could not be insisted upon. In affirming, the Michigan Supreme Court said (64 N.W. 2d at p. 558):

"In this case and all others of a similar nature, there are three parties involved, namely, the union, the management, and the public, and each have certain rights and responsibilities. All courts agree that the union has a right to strike and to do peaceful picketing when their objective is the accomplishment of a legitimate labor objective. \* \* \* Management also has the right to conduct a legitimate business for profit and to use modern devices in the conducting of such business so long as the devices used are not inimical to the health and welfare of its employees. The public has an economic interest in unemployment growing out of strikes."

The Court held that the test to be applied to the union's demand was whether it had

"any reasonable connection with wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment or for the protection from labor abuses"... (*idem* at p. 559)

Since the union's demand was found to be unrelated to health, safety or any other of these matters the Court held it could not be insisted upon.

The demands of a railroad union in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, were subject to injunction because they were designed to compel carriers to discriminate against Negroes in employment, contrary to a national policy against discrimination. The *Howard* case did not involve discrimination by a union against members of a class represented by it, as the RLEA asserts in its brief (Br. 30). The Negroes in that case were in a different class than that represented by the Brotherhood of Railroad Trainmen and were represented by their own union. 343 U.S. at p. 773. The Brotherhood's demand was designed to secure jobs for the employees it represented and was in the interest of all the employees represented

by the Brotherhood, but it was nonetheless subject to injunction. Thus a union's demand may be nonbargainable even though it favors the interests of all members of the class the union represents.

Petitioners seek to limit the *Howard* case by saying that the agreement sought by the union was illegal, and petitioners argue that "either the subject of the proposal is one on which agreement would be unlawful, or it is one with respect to which bargaining is mandatory" (Br. 40). This misconceives the rationale of the *Howard* decision. No statute was said to require a carrier to hire Negroes. The only reason the agreement in the *Howard* case was invalid was because it had been reached as a result of the coercive economic pressures of collective bargaining. As this Court noted, the case involved the loss of jobs by Negroes "under compulsion of a bargaining agreement which, to avoid a strike, the railroad made with an exclusively white man's union." 343 U.S. at p. 769. The Brotherhood had "forced the Frisco to agree to discharge the colored 'train porters'". *Idem* at 770 (Emphasis supplied). Similarly in *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U.S. 823, an injunction was granted against union action designed to take jobs away from employees-at-will represented by another union. Of course the carrier was free to discharge its employees-at-will, but the court held that these employees "were entitled to such employment at the will of the Santa Fe without illegal interference, compulsion and unjustified interference by the Trainmen." 181 F. 2d at p. 534. In the present case, even if it were not strictly illegal for respondent to continue to operate station agencies for which there was no use, such action would have violated a policy against inefficiency and waste in the national transportation system. Under the principles of the *Howard* case, a carrier

should not be forced or compelled to violate national policies in order to avoid a strike. The decision of this Court in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, makes it clear that the limits of mandatory collective bargaining are narrower than the limits to the legality of agreements. Of the two proposed clauses held nonbargainable the Court said that "each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions." 356 U.S. at p. 349. In *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85 (C.A. 4, 1956), an employer's proposal was also held to be legal if agreed to, but not a required subject of bargaining.

**C. Petitioners' Demand Has Not Historically Been a Matter for Collective Bargaining.**

Petitioners devote a portion of their principal brief and a long "appendix" to show that "stabilization of employment" is a desirable thing and that historically it has been a subject of collective bargaining. But the issue in the present case is not "stabilization of employment" but rather a specific demand made by petitioners which is quite different from anything cited by them as precedent. The main thrust of petitioners' argument is that (1) such matters as seniority and severance pay promote stabilization of employment, (2) carriers have traditionally bargained about seniority and severance pay, etc., (3) "stabilization of employment" is therefore a subject of mandatory bargaining, and (4) a veto over the abolition of positions promotes "stabilization of employment" and is therefore bargainable. The RLEA asserts in its brief that the proposal advanced by petitioners is "no different in substance" from that advanced by the employer in *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374 (C.A.

7, 1954), because the strike clause in the latter case "provides stabilization of employment" for the employer's benefits (Br. 44). However, the *Allis-Chalmers* decision was in effect overruled by this Court in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, which held non-bargainable a pre-strike ballot clause substantially identical to that sought by Allis-Chalmers. The demands of the labor organization in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, were also designed to achieve "stabilization of employment" and yet were not bargainable. Thus applying petitioners' "logic", (1) strike ballot and racially discriminatory clauses relate to "stabilization of employment," (2) they are nonbargainable, (3) therefore "stabilization of employment" is not a required subject of bargaining, and (4) therefore employers need not discuss seniority, work-sharing, severance pay and the like. *Amici curiae* recognize the fallacy in these lines of argument, because the question of bargainability must be examined with reference to specific proposals rather than abstract categories into which such demands might be placed. Consequently, instead of replying to petitioners' extended discourse with comparable vague generalities, we will analyze the particular proposal involved in this case.

In the first place the demand is one for an absolute veto over the abolition of positions, not for consultation, discussion, or joint studies between unions and employers on ways to minimize harmful effects of technological change. Petitioners' demand is thus totally unlike the Armour agreement (Pet. App. 17-18), the proposal in the present steel controversy (Pet. App. 18), and the prior consultation provision in the Maintenance of Way Agreement (Pet. App. 27). Petitioners object to the characterization of their proposal as a "veto" (Br. 42), but it is difficult to find a more apt word to describe it. They suggest that if the

proposal were in effect, the abolition of each position would be a matter for further bargaining. But the proposal would nevertheless give the union the right to stand firm in refusing to grant permission to abolish a position. Despite negotiation, mediation, proffers of arbitration and recommendations of an Emergency Board, petitioners would be able to compel respondent, by court action if necessary, to maintain unnecessary positions. The veto moreover is an absolute one. There is no exception for situations when business conditions require a reduction in force. Cf. Pet. App. 50. Petitioners suggest that they might on occasion withhold their veto. The circumstances of the present case demonstrate that it is most unlikely that petitioners will agree to the abolition of positions when they are no longer required for efficient operations. In any event the delegation of power to control the abolition of positions to a body which does not represent and need not consider the interests of anyone outside its members is objectionable. In *Pacific Intermountain Express Co.*, 107 NLRB 837, enforced *sub nom. National Labor Relations Board v. International Brotherhood of Teamsters*, 225 F. 2d 343 (C.A. 8, 1955), the National Labor Relations Board held invalid a contract which delegated to a union control over questions of seniority. Because of a union's natural tendency to favor its own members, the Board refused to presume that "such control will be exercised by the union in a nondiscriminatory manner." 107 NLRB at p. 845. If control over station agencies is delegated to petitioners, can we presume that it will be exercised in the public interest?

Secondly, the union's proposal has nothing to do with "distributing these [job] opportunities among union members according to some equitable principle" (Pet. App. 4). Contracts requiring seniority to be observed in lay-offs and rehiring promote equitable distribution of existing job op-

portunities, and, as petitioners point out, such provisions are common in collective bargaining agreements (Pet. App. 35). The widespread existence of such provisions assumes a right in management to make lay-offs. Seniority controls as to who shall be discharged when business conditions require a reduction in force. This issue would never arise if a union had the power to prevent all reductions in force. "Work-sharing" provisions are also cited by petitioners (Pet. App. 34, 36). These agreements requiring management to reduce the hours of all employees prior to laying-off any employees also relate only to the manner of distributing existing work. This again assumes a right in management to reduce expenses by curtailing unprofitable operations without the consent of the union. In the same way scope rules, and restrictions on subcontracting (see Pet. App. 30-32) relate to the issue of who is to perform work which must be done, not to the question whether or not such work should be performed at all. Work-crew manning requirements are also referred to by petitioners. Such provisions mean "*that if the Company chooses to carry out certain operations, it cannot reduce labor requirements to a level below that which is prescribed by the contract.*" (Pet. App. 42.) (Emphasis supplied.) Of course such provisions do not require a carrier to carry out or continue unprofitable operations, which, as petitioners concede, can be abandoned by displacing an entire crew. *Ibid.* It is one thing to say that if a train is run it must have a crew of 10 men, but quite another for a union to demand that a train must be run regardless of whether its operation is profitable or in the public interest.

A third general area in which collective bargaining procedures have been utilized to promote stable employment is that of guaranteed annual wages (Pet. App. 33-34, 46-47). Contract provisions in this field are designed to compen-

sate for seasonal variations in employment by guaranteeing a certain number<sup>2</sup> of employees a certain amount of work each year. The problem which called forth petitioners' demand was not seasonal unemployment, but rather the permanent abolition of positions. The demand sought by petitioners is not designed to even out employment of regular employees over the year. When a position is abolished it is because the work done will no longer be required at any time. And petitioners' veto power can be used to require permanent retention of an unneeded position.

More directly relevant to the problem in the present case are contracts providing for severance pay for employees permanently displaced by consolidations, technological change, or changed business conditions. (See Pet. App. 38-42.) Such provisions are in keeping with the general attitude of labor expressed by President Meany of the AFL-CIO in a statement quoted by petitioners:

"Certainly the trade union movement does not oppose technological change. There can be no turning back to a negative or short sighted policy of limiting progress. . . . The answer to technological change lies in smoothing its transitions and cushioning the shocks that attend it." (Pet. App. 7.) (Omission in original.)

Petitioners' proposal in the present case represents a very different attitude—that of attempting to veto changes required by modern conditions and of rejecting offers to cushion the impact of such changes. Respondent has not and does not contend that severance pay is a nonbargainable subject. In fact respondent has an agreement for supplemental unemployment benefits payable to displaced

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2. A number established in an agreement like that cited by petitioners (Pet. App. 47) is always substantially less than the total number of employees and thus does not prevent the abolition of positions.

employees in addition to benefits payable under the Railroad Unemployment Insurance Act (R. 303-312). This agreement covers employees represented by most of the nonoperating organizations. Respondent offered to extend the terms of this agreement to employees represented by petitioners, but the offer was not accepted (R. 103-104). The distinction between (1) an absolute prohibition on railroad consolidations which result in displacement of employees and (2) the promotion of "fair and equitable arrangements" to protect displaced employees has already been noted (*supra* p. 27). Congress in enacting the Transportation Act of 1940 demonstrated its approval of the latter alternative as a means of harmonizing the divergent policies of promoting efficiency and stabilization of employment. Respondent's offer satisfies this objective. The Emergency Railroad Transportation Act of 1933, cited by petitioners (Pet. App. 21), represented a modified form of the first approach but was allowed to expire in 1935 because it had the effect of prohibiting necessary consolidations. Jones, *Railway, Wages and Labor Relations, 1900-1952*, p. 98 (1953).

A most important distinction also exists between petitioners' demand for a veto over the abolition of positions and a rare but not unheard of provision which restricts lay-offs. (See Pet. App. 19.) The latter kind of agreement protects present employees from losing their jobs but does not prevent reduction in the work force by reason of normal attrition. (See Pet. App. 48; cf. RLEA Br. 40.) Respondent has indicated a willingness to negotiate about an arrangement limiting actual lay-offs over and above the effects of attrition (R. 158). But petitioners will talk of nothing less than a veto over the abolition of positions (R. 118, 150). The abolition of a position would not necessarily result in anyone's losing a job. See *Great*

*Northern Ry. Co. Discontinuance of Service*, 307 ICC 59, 72 (1959). Present holders of positions no longer needed can be transferred to other jobs, either to existing positions which are vacant or to newly created positions. (See R. 300.) Petitioners' demand on the other hand would deprive respondent of the power to abolish an unneeded position even if the present occupant had quit, retired or died!

Petitioners' long dissertation on "stabilization of employment" shows that this broad term covers a multitude of different contractual provisions that are unlike the demand at issue in this case. Therefore references to "stabilization of employment" in moratorium agreements signed by respondent (see Pet. App. 25-26) do not constitute a prior concession by respondent of the bargainability of petitioners' demand. The November 1, 1956, agreement, which permitted the serving of notices dealing with "stabilization of employment," prohibited notices to "establish agreements . . . covering . . . time paid for but not worked" (R. 268). It would seem proper to assume, therefore, that "stabilization of employment" as used in railroad labor relations relates to such matters as work-sharing, seniority, scope rules, etc. which do not require the retention of unneeded employees and thus necessitate "time paid for but not worked." (See R. 287-291.)

Even if there should be any agreements like that demanded in the present case, it would not follow that an unqualified veto over the abolition of positions is a required subject of bargaining under the Railway Labor Act. In the *Borg-Warner* case, there was ample precedent for a contract requiring employees to vote prior to a strike. See *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374, 379 (C.A. 7, 1954); 2 *Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts* 77:551-556 (B.N.A., 1948). But this Court neverthe-

less held a proposal for such a clause was beyond the scope of mandatory bargaining, even though it had been agreed to by the parties when the case was decided. 356 U.S. at p. 347. Accord, *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. 2d 748 (C.A. 7, 1940). Since parties are free to bargain voluntarily about subjects beyond the scope of mandatory bargaining, instances of a proposal's being incorporated in another contract do not prove that bargaining about such a proposal is required.

Unlike contracts dealing with seniority, work-sharing, severance-pay, lay-offs and the like, petitioners' demand covers the abolition of positions themselves rather than any effect which the abolition of a position may have on employees. Like a demand for a veto over the discontinuance of a train or a branch line, petitioners' proposal relates to respondent's internal procedures rather than relations between respondent and its employees. *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, 350. Moreover, it relates to those management decisions that Congress has left to state regulation in the public interest under a national policy which respondent's decisions were designed to effectuate. Enforcement of petitioners' demand would seriously frustrate that policy.

## **II. A STRIKE CALLED FOR THE SOLE PURPOSE OF COMPELLING AN EMPLOYER TO SUBMIT TO A DEMAND BEYOND THE SCOPE OF COLLECTIVE BARGAINING UNDER THE RAILWAY LABOR ACT IS NOT PROTECTED BY THE NORRIS—LA GUARDIA ACT.**

Since the petitioners' demand for a veto over the abolition of unneeded positions is not a required subject for collective bargaining, a strike to enforce it is not protected from injunction by the Norris-La Guardia Act. The protec-

tion accorded by that Act to concerted activity is limited to cases in which a "labor dispute" is involved. *Bakery Drivers Union v. Wagshal*, 333 U.S. 437; *Columbia River Co. v. Hinton*, 315 U.S. 143. The question whether the object of a strike by a railroad labor organization involves a "labor dispute" requires a consideration of the objects of collective bargaining as defined by the Railway Labor Act. This Court has held:

"... the Norris-La Guardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30, 40.

The object sought to be achieved by a strike must not be foreign to the objects of the Railway Labor Act. Despite the Norris-La Guardia Act, a labor organization can be enjoined from seeking to enforce an award of the National Railroad Adjustment Board invalid for failure to comply with the procedural requirements of the Railway Labor Act. See, e.g., *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. Clerks*, 188 F. 2d 302 (C.A. 7, 1951); *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (C.A. 7, 1950), certiorari denied, 340 U.S. 823; *Hunter v. Atchison, T. & S.F. Ry. Co.*, 171 F. 2d 594 (C.A. 7, 1948), certiorari denied, 337 U.S. 916.<sup>3</sup> A strike to compel a railroad to discriminate against Negroes in employment violates the Railway Labor Act and may be enjoined. Cf. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768; *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232. A strike against a management decision to close a railroad yard, a subject beyond the scope of collective bargaining defined in the Railway Labor Act, does not involve a labor dispute and

3. The rule is the same in the other circuits.

thus the Norris-La Guardia Act is no bar to an injunction against the strike. *New York Central R. Co. v. Brotherhood of Railroad Trainmen*, 246 F. 2d 114 (C.A. 6, 1957), certiorari denied, 355 U.S. 877.

The RLEA's oblique reference to this last case is followed by several misleading statements (Br. 51-52). The Brotherhood in that case did not claim that the closing of the Toledo Yard in itself violated any agreements, see 140 F. Supp. at 278, and neither party referred the dispute to the Adjustment Board. The case did not involve a minor dispute and does not "fall within the scope" of the *Chicago River & Indiana* decision. The Mediation Board did not refuse to participate, as the RLEA asserts, but rather it intervened twice, the second time on its own motion, and attempted to achieve a settlement by mediation between July 8 through August 1, 1955 and again from August 4 through December 16, 1955 (140 F. Supp. at pp. 274-276).

Since the *Toledo Yard* dispute was fully processed for 5 months under the Railway Labor Act, the failure of the Brotherhood to serve a formal Section 6 notice prior to the negotiation and mediation was at most a technical defect which was not relied on by either the district court or the court of appeals. Petitioners' attempt to use this fact to distinguish the present case is thus unsupportable (Br. 25). The present case is a much stronger one for an injunction, because unlike the closing of a yard, respondent's central agency plan for stations concerned a matter left by Congress to public regulation and the plan was approved by state commissions after hearings in which petitioners were fully represented. Consequently, this Court's statement in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552, is particularly appropriate here:

"More is involved than the settlement of a private controversy without appreciable consequences to the

public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. . . . Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Although the petitioners in the present case went through the form of serving Section 6 notice on respondent, the ensuing negotiations were made meaningless by petitioners' insistence on a demand beyond the scope of collective bargaining and their refusal to discuss any alternatives (R.118, 150). Petitioners hint in their brief that "original demands are almost invariably altered in the bargaining process" and that the Union might have agreed to a modification of their proposals (Br. 42). But the record shows they did not. Respondent made several proposals for bargaining on ways to alleviate any hardship to employees that might result from the central agency plan (R. 76-77, 103-104, 158). All were rejected. As petitioners' President testified, "the only alternative which up to the present I have offered the North Western was to comply with this rule or strike" (R. 148). Petitioners' attitude is in marked contrast to that of other organizations, such as, for example, the Brotherhood of Maintenance of Way Employees who, when faced by claims of nonbargainability, have been willing to discuss and reach agreements on alternatives. See Pet. App. 26-27.

The duty to bargain collectively requires more than compliance with certain formalities. *Brotherhood of Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F. 2d 36, 40 (C.A. 4, 1953). Insistence by an employer in good faith on a proposal outside the scope of mandatory bargaining constitutes an "illegal refusal to bargain and the employer may be required to drop his demand. *National Labor Relations Board v. Borg-Warner Corp.*, 356

U.S. 342. In the same way a union's insistence on a non-bargainable demand violates the union's duty to bargain and is subject to injunction. *National Labor Relations Board v. Retail Clerks International Ass'n.* 203 F. 2d 165 (C.A. 9, 1953); *Penello v. International Union, UMW*, 88 F. Supp. 935 (D.D.C., 1950). Petitioners argue that although an employer may be compelled to drop insistence on a non-bargainable demand by court order, a union is free not only to make such a demand but to strike to compel an employer to submit to it (Br. 38-39). The law is not so one-sided. The *Borg-Warner* case, it is true, did not involve a strike injunction because there an employer used its bargaining power to procure desired proposals by refusing to sign a contract which did not include what the employer wanted. A union, on the other hand, has the strike as its means of enforcing demands. Just as an employer cannot use his economic power to procure nonbargainable demands, a union's resort to a strike to enforce a nonbargainable demand may also be enjoined. *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278 (C.A. 2, 1957); cf. *National Labor Relations Board v. National Maritime Union*, 175 F. 2d 686 (C.A. 2, 1949). When, as here, a strike whose sole object is to enforce a nonbargainable demand is coupled with a refusal to discuss any alternatives to the demand, the strike itself is a violation of the union's duty to bargain. *Douds v. International Longshoremen's Ass'n. supra.*

An employer's refusal to bargain is subject to injunction under the Railway Labor Act notwithstanding the Norris-La Guardia Act. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515; *Brotherhood of Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F.2d 36 (C.A. 4, 1953.) Since Section 2 First of the Railway Labor Act imposes the duty to bargain on both carriers and employees, a union's

violation of such duty should also be subject to injunction. Petitioners' duty to bargain would be meaningless unless a strike for the sole purpose of enforcing a nonbargainable demand can be enjoined. Petitioners argue that a private party cannot enjoin a strike growing out of an unfair labor practice (Br. 39). Violations of the Railway Labor Act, however, can be enjoined by private parties, because otherwise the duties imposed by that Act would be unenforceable. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515; *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768; *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30; *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232.

Not one of the cases involving the Norris-La Guardia Act cited by the RLEA in its brief (pp. 48-51) is in point, because none concerns a union with a statutory duty to bargain on certain subjects, whereas the Railway Labor Act imposes on petitioners the duty to make agreements concerning rates of pay, rules, and working conditions in order to avoid interruptions to commerce. None of the cited cases concerns a labor organization under the Railway Labor Act, and all of these decisions were prior to 1947 when the duty to bargain was first imposed on unions outside the Railway Labor Act. A number of the cited cases do not even concern injunctions against a strike.<sup>4</sup>

The injunction ordered by the court below does not prohibit a strike to obtain higher pay or better working conditions. Such an injunction "strips labor of its primary weapon without substituting any reasonable alternative." See

4. *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91 (quoted at page 48) and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (quoted at page 49) concerned picketing only. *United States v. Carrozzo*, 37 F. Supp. 191 (N.D. Ill. 1941), affirmed, 313 U.S. 539, involved a criminal indictment for violation of the Sherman Act.

*Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S., 30, 40. But when a union feels aggrieved by a management decision such as the central agency plan, two reasonable alternatives to a strike are open. First, since railroads' actions are subject to regulation by state or federal administrative bodies in the public interest, management decisions of this type must be approved by such bodies. Labor organizations may appear before these tribunals to protest changes which may affect them adversely. The conflicting interests of labor, management, and the general public can be considered, weighed and reflected in the decisions of such a body. When the Interstate Commerce Commission is called upon to authorize abandonment of a train, representatives of employees are permitted to present objections and consideration will be given to the effect of the discontinuance on employees. *Great Northern Ry. Co. Discontinuance of Service*, 307 ICC 59, 74 (1959). In *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, a dispute arose as to whether under an Interstate Commerce Commission order the employees of trunk-line railroads should handle movements over the tracks of the River Road or whether these operations should be performed by employees of the River Road. The Brotherhood representing the latter group was allowed to intervene in a suit brought by the trunk-line railroads to require that the work be done by their own employees. But though the union was permitted to argue the issue in court, the Norris-La Guardia Act did not prevent the court from issuing an injunction awarding the work to the trunk-line railroads. *Baltimore & Ohio R. Co. v. Chicago River & Indiana R. Co.*, 170 F. 2d 654 (C.A. 7, 1948), certiorari denied, 336 U.S. 944. A similar procedure was followed in the present case. Petitioners were permitted to and did present objections to the respondent's

central agency plan before the Commissions in Iowa and South Dakota (R. 172, 217-18). Petitioners were able to block a similar proposal by another carrier in Minnesota by court action (R. 147). They sought judicial review of the South Dakota Commission's determination that the respondent's plan was in the public interest (R. 56).

A second alternative is open to petitioners in place of the strike called to prevent abolition of these unproductive positions. Respondent concedes that the employment consequences of the abolition of a position are an appropriate subject for collective bargaining. Respondent remains ready and willing to discuss ways to alleviate hardship to any employees adversely affected by the abolition of a position. Such matters as transfer of displaced employees to productive work on a seniority basis, severance pay, limitation on lay-offs, or other alternatives are open to negotiations. Petitioners in their "appendix" suggest a host of matters relating to stabilization of employment as it affects employees which are concededly bargainable and about which respondent has already expressed a willingness to bargain (R. 76-77, 103-104, 158). As the court noted in *New York Central R. Co. v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273 (N.D. Ohio, 1956), affirmed, 246 F. 2d 114 (C.A. 6, 1957), certiorari denied, 355 U.S. 877 (140 F. Supp. at pp. 282-283):

"The closing of the North Toledo Yard may have the effect of requiring a reallocation of the work of thirty-five employees. If and when it does, that issue can and must be met, and it must be met in compliance with the requirements of the Railway Labor Act. The closing of the Yard as decreed by management is the initial step—that comes first. If and when the interests of the employees require attention as a result of the closing, then under the terms of the Railway Labor Act plaintiff and defendants are required to negotiate. . . .

"We believe that a labor dispute cannot be found over the closing of the North Toledo Yard by seeking to incorporate in that action the anticipatory results upon the employees. The latter is a separate and distinct problem that may be met when the time arrives."

So also the abolition of a position, the closing of a station, the discontinuance of a train or of a branch line are not in themselves subjects of mandatory bargaining or strikes. This imposes no irremediable hardship on labor because insofar as these actions have an effect on employees, these employment consequences are bargainable.

### **III. THE RAILWAY LABOR ACT PROHIBITS STRIKES FOR THIRTY DAYS FOLLOWING TERMINATION OF THE SERVICES OF THE NATIONAL MEDIATION BOARD.**

Petitioners' point VII B (Br. 69-71) concerns an issue which is long since moot and need not be decided by this Court. The right of a union to strike during the thirty days following the second intervention by the National Mediation Board is no longer an issue in the case because this time period expired over a year ago. *Amici curiae*, therefore, do not brief this matter.

Petitioners' point VII A (Br. 65-69) concerns the right to strike during the thirty days following the first attempt at mediation and is also moot. Moreover, it was not raised in the petition for certiorari and therefore is not appropriate for decision by this Court. Nevertheless, the question is so important under the Railway Labor Act that *amici curiae* cannot let petitioners' misstatements remain unanswered.

Petitioners' assumption that the Railway Labor Act is a one-way street, imposing obligations on employers but

not on employees, is also apparent in this portion of their brief. They assert that although Sections 5 First and 6 of the Act require a carrier to maintain existing conditions pending mediation and for thirty days thereafter, no such duty is imposed on employees (Br. 66). It is true that Section 6, which covers the period of mediation proceedings, does refer specifically to carriers only. Section 5 First, however, covers the thirty-day period following mediation and does not refer to either party particularly. And it is clear from the legislative history of the Railway Labor Act that employees were required to refrain from striking even during the period covered by Section 6. During the hearings before the House Committee on Interstate Commerce, Mr. Richberg, the chief spokesman for labor and one of the principal draftsmen of the Act, was asked:

"Now, does the bill carry any provision wherein the parties agree, pending mediation or adjustment or arbitration, that the status quo shall be maintained, that is, the continued operation of the railroads?"

"Mr. Richberg. There are several provisions operating to carry out that idea.

"Mr. Garber. Is there any direct provision wherein the parties agree that, pending the adjustment of their controversy, the continued operation of the railroads shall be maintained?"

"Mr. Richberg. Yes. I would like to take these provisions one by one, in order to show their cumulative effect.

"Mr. Garber. All right.

"Mr. Richberg. In the first place, it is their duty to exert every reasonable effort—taking page 3—to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate

violation of that legal duty could be prevented by court compulsion." (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180, 69th Cong., 1st Sess., pp. 90-91 (1926)).

"As to maintaining the existence of the status quo from the time a dispute is engendered, it is a violation of the duties imposed by this law *for either party* to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law" (*idem* at p. 92).

"Mr. Richberg . . . . As I have said, we have not sought to write a prohibition upon one party; we have sought to place upon both parties the obligation to maintain conditions unchanged, and that obligation, I will say frankly, can certainly be enforced against any concerted move to change the conditions.

"Mr. Fredericks. Do you construe that then to mean that pending negotiations the employees' organizations could not call a strike?

"Mr. Richberg. They could not carry out a strike."  
(*Idem* at p. 94.)

In the House debates it was stated:

"There is one assurance the American people will have and that is that from the beginning of a dispute, all through the period of conciliation, all through the period of mediation, all through the period of arbitration, and for 60 days following the calling of the emergency board by the President of the United States, there will be no strike, there will be no interruption of traffic.

"Those who framed this bill are on record as stating that this is their interpretation of the language of the bill." 67 Cong. Rec. 4657.

The co-author of the Norris-La Guardia Act, in speaking of the Railway Labor Act, recognized that "the workers

could not and would not think of going on strike before all the remedies provided in the law have been exhausted." 75 Cong. Rec. 5504. This Court in speaking of major disputes under the Railway Labor Act has stated:

"The parties are required to submit to the successive procedures designed to induce agreement. Section 5. First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self help." *Elgin, J. & E.R.Co. v. Burley*, 325 U.S. 711, 725.

In *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C.A. 4, 1957), certiorari denied, 355 U.S. 914, the Brotherhood sought to avoid the *Chicago River & Indiana* decision (353 U.S. 30) by arguing that the dispute was a major one. But the court affirmed an injunction, holding that a strike even over a major dispute is subject to injunction unless the procedures of the Railway Labor Act are first exhausted:

"If 'the moral force of public opinion (is the) ultimate sanction' of the Act in the disposition of 'major disputes,' it is incumbent upon the parties to submit themselves to the successive procedures of the Act before resorting to self-help. \* \* \*" 248 F. 2d at p. 45.

The Brotherhoods, therefore, were not "free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a 'major dispute' under the required procedures of the Act." *Id.* at p. 46.

Petitioners' argument that a strike may be called at any time before an emergency board is appointed was rejected in *Brotherhood of Railway Clerks v. Railroad Retirement Board*, 239 F. 2d 37 (C.A. D.C., 1956). In that case a strike begun during mediation was held to violate the Railway Labor Act and the striking employees were there-

fore denied employment compensation benefits by the Railroad Retirement Board, whose decision was affirmed by the court of appeals. The same position is also taken by the National Mediation Board. The Board's memorandum filed in this Court refers to "a strike call issued at the end of the 30-day standstill period required by the statute" (p. 2), and "a strike called following the termination of the required 30-day standstill period" (p. 6). Thus, though the Board argues there is no second thirty-day waiting period required after a second attempt at mediation, it assumes that the first thirty-day requirement binds employees as well as carriers.

Neither *Brotherhood of Railroad Trainmen v. Toledo P. & W. R. Co.*, 321 U.S. 50, nor *Butte, A. & P. Ry. Co. v. Brotherhood of Locomotive Firemen*, 268 F. 2d 54 (C.A. 9, 1959), certiorari denied, 361 U.S. 864, cited by petitioners (Br. 65), supports their argument that unions are free to strike at any time until an emergency board is appointed. In the first case, the National Mediation Board's initial mediation was terminated on November 21, 1941, and the strike did not begin until December 28, 1941. 321 U.S. at pp. 51-52. In the *Butte* case, the carrier did not contend that the strike was commenced during the thirty-day waiting period. The carrier insisted that mediation was terminated on January 17, 1958 and there the strike was originally called for March 14, 1958. 268 F. 2d at pp. 56-57. In fact, the strike had still not begun when the court of appeals handed down its decision over a year later. *Ibid.*, note 7.

Therefore, if the Court feels it necessary or proper to decide the issue raised by petitioners' point VII A, the legislative history and judicial and administrative interpretation of the Railway Labor Act demonstrate that the waiting periods prescribed by the Act are applicable to unions as well as to carriers.

#### **IV. THE DISTRICT COURT HAD POWER TO ISSUE AN INJUNCTION PENDING APPEAL.**

Petitioners' Point VI (Br. 57-64) is devoted to another issue which this Court need not decide. Whether or not this Court affirms the decision below, the question of the propriety of the district court's injunction pending appeal will be moot. The question would only be relevant in contempt proceedings for violation of the district court's order, but here petitioners have complied with the injunction issued under Rule 62 (c) of the Federal Rules of Civil Procedure.

In any event, petitioners' contention on this point is without merit. It is true but irrelevant that the Federal Rules of Civil Procedure were not intended to modify federal statutes such as the Norris-La Guardia Act. But in the present case the applicability of the Norris-La Guardia Act was seriously disputed. Pending a final determination of this question, the district court was not without power to preserve existing conditions. In *United States v. United Mine Workers*, 330 U.S. 258, this Court held that regardless whether the Norris-La Guardia Act was ultimately held to apply in the case before it, the district court had power to enter a temporary restraining order against a strike pending decision of the jurisdictional issue.

"The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-La Guardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of the jurisdictional question. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction." 330 U.S. at p. 290; see also 330 U.S. at pp. 309-311 (concurring opinion).

The same principle gave the district court the power to issue its injunction pending appeal.

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 1959.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

**No. 100**

**THE ORDER OF RAILROAD TELEGRAPHERS,**  
A VOLUNTARY ASSOCIATION, ET AL.,  
*Petitioners,*

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY**  
**COMPANY, A CORPORATION,**  
*Respondent.*

**PETITIONERS' REPLY BRIEF.**

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**PETITIONERS' REPLY BRIEF.**

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1.

**THE FACTS.**

The Railroad's statement seeks to ignore or obscure one paramount fact: This lawsuit arose out of the refusal of the Railroad to bargain with the Union concerning the contract change proposed by the Union's Section 6 notice. This transcendent fact is clearly established by the findings of the District Court:\*

"4. Plaintiff by letter dated December 24, 1957 acknowledged receipt of the Section 6 notice and took the position that the subject matter of the proposed

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\* Respondent expressly states it challenges none of the findings except a portion of Finding No. 17. (R. 357.) (Respondent's brief, p. 17, n. 1.) We deal with its contention as to Finding 17 at p. 16, note.

rule was not a proper subject matter for a Section 6 notice. Plaintiff took the same position in the conference held between representatives of the plaintiff and Telegraphers on January 17, 1958, and reiterated the same position in a later letter dated January 21, 1958." (R. 352.)

"20. The plaintiff has refused to negotiate, confer, mediate or otherwise treat with defendant Telegraphers on the proposed change in agreement set forth in the Section 6 notice served by defendant Telegraphers on plaintiff on December 23, 1957. \* \* \* (R. 357.)

It is clearly established by the testimony of Mr. Ben Heine-  
man, Chairman of the Railroad:

"You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified nor in my opinion can it be." (R. 104.)

Notwithstanding the record, the Railroad still attempts to create the impression that it was the Union and not the Railroad that refused to bargain.

First of all, the Railroad characteristically and tacitly shifts the subject of discussion—this time from the statutory notice to its own Central Agency Plan. Certainly it is true that the Railroad belatedly indicated a willingness to discuss with the Union this quite different matter. The District Court so found in the same finding in which it found that the Railroad refused to bargain concerning the statutory notice:

"20. \* \* \* The plaintiff did show willingness to negotiate upon the Central Agency Plan, including a possibility concerning severance pay." (R. 357.)

The finding of the District Court is wholly consistent: The Railroad refused to bargain as required by law concerning the subject of the statutory notice; it belatedly indicated willingness to discuss, outside the framework of the Railway Labor Act, quite another matter—its own unilateral scheme for centralizing agencies. The Railroad's emphasis, therefore, on a casual and very brief conversation between the chairman of the Railroad and the president of the Union—long after the proposal for contract revision had been served and while mediation was in progress—concerning the possibility of agreement on the plan which the Railroad was obdurately proceeding to place in effect (Resp. brief, p. 15), is to no purpose whatever. Indeed, both parties regarded the conversation as so unrelated to the contract proposal of the Union that neither of them told their representatives about it, although the matter was then pending in mediation and the mediator was actively conferring with the parties.\* (R. 111, 154.)

Even more pointless is the Railroad's distortion of testimony given by counsel for the Union in connection with a wholly unrelated matter, a half year after this case had

\* Another instance relied upon by the Railroad to show that it was willing to bargain relates to its claim that it made certain statements to the Mediator during the emergency mediation on August 19th, the day before it filed this action in the District Court. Whatever was said to the Mediator was not communicated to the Telegraphers. (R. 143-144, 154.) The laxness of Respondent's handling of the facts stands out upon a comparison of note 1, p. 13, Respondent's brief with the actual testimony (R. 143, 144) and its complete disregard of the testimony of another witness. (R. 154.) The remaining item has to do with the willingness of the Railroad to extend its agreement for supplemental unemployment benefits to the Union. The only thing in the record on this is the statement of the Chairman that the Plan was offered to the O. R. T. in the Fall of 1957 (R. 103-104), prior to the service of the Section 6 notice. The statement in the Railroad's brief (p. 16) that an offer was made "during the controversy over the threatened strike" is not supported by the record unless the offer be considered as having been made by Mr. Heineman when he was testifying during the hearing.

been decided in the District Court. The Railroad presumes to characterize the attitude expressed in the testimony in these words: " \* \* \* never bargain with a private employer if you can bargain with Congress." (Resp. brief, p. 20.) We are confident that no fair-minded reader can place a similar interpretation upon this testimony (Resp. brief, pp. 19-20), particularly when read in context.\* Attributing such an attitude to the Union comes with very bad grace indeed from the Railroad, which has maintained throughout this case, and even now maintains that it will not negotiate with the Union concerning a contract provision relating to job discontinuance, but will deal exclusively with state regulatory commissions.

A second area of fact distortion relates to the Railroad's principal theory, that the contract proposal contained in the Union's Section 6 notice would frustrate state regulatory action and hence is illegal. This is accomplished by a lengthy description of the Central Agency Plan by the Railroad and the initiation by it of proceedings before various state commissions for approval of the plan. The first reference to the Section 6 notice served by the Union is placed in such context as to give the impression that in point of time it was an afterthought of the Union, directed at the frustration of orders already entered by state commissions. Thus in the Railroad's statement of questions presented, there is the following:

"Did Congress intend that the interruption of interstate commerce incident to a railroad strike can be founded upon a contract demand that no position in being on a date antecedent to the demand be discon-

\* Before the colloquy which respondent quotes occurred, Senator Morse had sharply differentiated between unemployment insurance as a proper subject for legislation and dismissal compensation which the Committee felt should be the subject of collective bargaining. Hearings on S. 226, 86th Congress, 1st Session, pp. 100-103, Subcommittee on Railroad Retirement, the Committee on Labor and Public Welfare, United States Senate.

tinued without the Union's consent, *where the purpose and effect of such demand is to prohibit the carrier's compliance with state commission orders in a sector of interstate commerce left by Congress to state regulation in the interest of economical and efficient transportation service to the public?*" (Emphasis added.) (Resp. brief, Question 1, p. 21.)

The brief of the Railroad Associations *amici curiae* puts the question as follows:

"Is a railroad labor organization's demand for a veto over the abolition of positions a required subject of bargaining under the Railway Labor Act where the demand is designed to frustrate a plan for coordinating station agencies which *has been approved* by state regulatory commissions?" (Emphasis added.) (Railroad Assoc. brief, Question 1, p. 3.)

The simple and undisputed fact is that the Section 6 notice was served by the Union on December 23, 1957, and the first order to be entered by any state commission was the South Dakota order, entered on May 9th, 1958 (R. 193) and modified on June 13, 1958. (R. 340-342.) The only other state commission order entered prior to the commencement of the action was the Iowa order, entered on August 11, 1958, less than ten days before the commencement of this action. (R. 216-46.) When the Section 6 notice was served on December 23, 1957, a petition initiated by the Railroad was pending before the South Dakota commission for authority to close 69 stations, or alternatively for approval of the Central Agency Plan. The Railroad operates in nine states. (R. 5.) No order that might later be entered by the South Dakota Commission could alter the rights and duties of the parties with respect to collective bargaining under the Railway Labor Act. (See Part II, *infra*.) But even if there were any substance in the Railroad's argument concerning the overriding authority of the state commissions, any order which the South Dakota Commission

might later issue (1) could not result in abolition of positions of employees, other than station agents at one man stations in South Dakota,\* and (2) could not similarly affect any of the employees, including station agents, represented by the Union and employed in other states. The Section 6 notice related to all positions represented by the Union in all states in which the Railroad operates.

Moreover, the Railroad first refused to bargain with relation to the Section 6 notice on December 24, 1957. In its letter of that date (Def. Ex. 2, R. 33) no reference is made to the Central Agency Plan nor to any proceeding before any state regulatory commission. The refusal to bargain was placed on two grounds, both of which have been abandoned by the Railroad on this appeal; first, that the subject matter of the Section 6 notice was not a proper subject since it did not concern rates of pay, rules and working conditions, and second, that the Section 6 notice was an attempt to usurp management prerogatives.

The service of the Section 6 notice must be viewed in the light of the facts that the new management, in the space of two years, had reduced the number of employees from approximately 26,000 to approximately 18,000, a net reduction of 8,000 (R. 87, 166), and at the time of the service of the Section 6 notice more than 100 positions other than station agents had been abolished.\*\* (R. 120.)

\* The Union represents, in addition to station agents and assistant agents, telegraph operators, telegraph operator-clerks, telegraph operator-levermen, telephone operators, operators of printing telegraph machines or similar devices, non-telegraph-levermen, and tower and train directors. (Agreement between North Western and Union, Ex. 19, Rule 1, R. 137.)

\*\* Typical of the handling of facts by the Railroad is this statement (Resp. brief, note 1, p. 4): "In his testimony Mr. Leighty, President of the O. R. T. referred vaguely to the 'slaughter' of 100 jobs over and above those involved in the Central Agency Plan. (R. 120.) When pressed on cross-examination, he could not identify these jobs with any precision (R. 141-2, 322); and the only specific occasion of job losses he cited was the taking over

The District Court found that "The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agreement on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on December 23, 1957." (Finding 19, R. 357.) This finding is not challenged by the Railroad. Instead the Railroad disregards the finding and presents a statement of facts to this Court devoted to an elaborate discussion of the Station Agency Program, the reasons therefor, the record of its respective petitions filed with various state commissions to obtain permission to effectuate the Station Agency Program and a realignment of facts, seeking to give the impression that the dispute which gave rise to the strike was over the Station Agency Program. The Railroad did not succeed in persuading the District Court to accept this version of the facts, and cannot have a trial *de novo* before this Court.\*

by North Western of the operation of its wholly owned subsidiary, the Omaha." Mr. Leighty stated that his testimony was based on the membership records of the Telegraphers. (R. 141.) To expect the President of a national union representing thousands of employees to relate from memory the particular positions abolished is, of course, entirely unreasonable. The Railroad with its payroll records at its command did not offer any evidence to contradict Leighty's testimony and in fact, did not claim it was untrue, nor does it claim it is untrue in its brief filed in this Court. It seeks to meet the testimony by referring to a compilation of positions abolished since the service of the Section 6 notice (Resp. brief, page 4, note 1), which compilation, of course, has no bearing on positions abolished prior to service of the Section 6 notice.

\* The Railroad's proposed finding No. 5, rejected by the District Court, read in part as follows: "This proposal (Section 6 notice) was prompted by, and was directly addressed to, plaintiff's action in announcing and moving to seek authority for its Central Agency Plan; and the threatened strike founded on this proposal results from the Central Agency Plan."

## II.

**THE DECISION OF THE COURT OF APPEALS CANNOT BE SUSTAINED ON THE THEORY THAT PERMISSIVE ORDERS OF STATE REGULATORY COMMISSIONS SUPERSEDE THE PROVISIONS OF THE RAILWAY LABOR ACT.**

For understandable reasons, the Railroad has virtually abandoned any attempt to defend the opinion of the Court of Appeals. The abandonment of the contention that no labor dispute is involved is express. (Resp. brief, pp. 33-36.) So also is the abandonment of the intemperate claim that the subject of the proposed agreement was solely a matter of "managerial prerogative."\* (*Id.*, 40.) An attempt

\* Nevertheless, the Railroad does invoke that last resort of the desperate litigant, the *reductio ad absurdum*, contending that our comprehensive interpretation of the duty to bargain would open the door to unacceptable results. ("Will the ORT concede that its members may be legally locked out upon the basis of any demand the North Western may choose to serve, and to stand upon, under Section 6, no matter how outrageous in its purpose and effect with respect to independent unionism?" (Resp. brief, p. 64).) If the entire universe of railroad operations were to be considered, it is clear, of course, that there are certain matters (such as the selection of managerial personnel or of union officers) that are exclusively within the province of the Railroad or of the employees, respectively, and are treated as such by the Railway Labor Act. (Section 2, Third.) Apart from such matters, there are those which, once within the exclusive control of management, have been bargained about and therefore are no longer subject to management's unilateral discretion. There are others of mutual concern now in the control of management because not yet made subject of agreement but which may in the future be the subject of agreement. The history of bargaining in the railroad industry is a dynamic and evolutionary one; just as changing times and technological developments give rise to new problems of efficiency in operation, so also do they give rise to new problems of labor relations. Thus the area in which bargaining is required must expand in response to the need for maintaining peace and continuity of operations in the industry. Significantly, while the Railroad and the Railroad Associations *Amici* cast some animadversions upon the Appendix to Petitioners' brief, neither disputes the fact that for some 27 years following the enactment of the Railway Labor Act the parties by their practice interpreted the Act as placing no

is made, however, to preserve the substance and effect of that argument in a more subtle and polite way. The suggestion now is, not that job abolition is the arbitrary prerogative of management, but that the new management of the Railroad has exercised its discretion wisely and has reached a decision which will contribute to the efficiency of its operations, and that all right-thinking people, including the Justices of this Court, should agree that this is so. The question presented by this case, however, is not whether the Central Agency Plan is good railway management. Times have changed, technological progress has created extensive possibilities of increased efficiency, and at the same time extensive possibilities of human injustice related to technological unemployment. So long as the Railroad has need of the services of human beings, it must bargain with their lawful representatives for those services.

We have emphasized from the beginning that the central question is whether a labor union is to have a voice in determining how the fruits of increased productivity and the burdens of consequent technological unemployment are to be distributed between employers and employees. Labor's interest in the matter is ignored by the Railroad. It chooses rather to emphasize to the Court that progress and efficiency are good things, minimizing the human side of the balance sheet. While it no longer employs the crude war cry of "managerial prerogative", its present suggestion that the Court should approve the Central Agency Plan as the product of wise and efficient management equally excludes employees from any interest or concern in the matter.

"Managerial initiative" (*Id.*, 57) has replaced "mana-

limit on subjects of collective bargaining, or the recent origin of the "non-bargainability" argument, nor is there any challenge by the Railroad to that portion of petitioners' brief which establishes that this Act requires bargaining as to all subjects. (Petitioners' brief, pp. 26-33.)

gerial prerogative" as the question-begging formula that is central to the Railroad's argument—managerial initiative, with the passive blessing of assorted state regulatory agencies. For the Railroad is willing to share with state regulatory agencies, and perhaps with this Court—though not with the organization representing the Railroad's employees—responsibility for determining what economy measures are desirable in the interest of efficiency. Indeed, the Railroad's whole case is now reduced to the proposition that Congressional transportation policy has vested sole responsibility for determining questions of job abolition and technological unemployment in management, subject to review by state regulatory agencies. Although the consequences of such determinations are vital to the labor movement and the welfare of the employees, the employees are to have no voice whatever, and collective bargaining is to play no part in their consideration.

This remarkable proposition rests upon a still more remarkable argument spun from "legislative history". There is one hard kernel of historical fact in the argument: In its report on the Transportation Act of 1958 the Conference Committee agreed to the House version of what was to become Section 5, rejecting the Senate version, which would have vested in the Interstate Commerce Commission jurisdiction over discontinuance of "any station, depot or other facility". It is quite clear, we agree, that this fact shows that Congress intended to leave matters *in statu quo ante*, and did not intend to lodge jurisdiction over such local matters in Washington, where the interested members of the public could be heard only with considerable difficulty and expense. But the Railroad would derive more—fantastically more—from this meager fact: By its inaction, by its passiveness, by its mere failure to extend the jurisdiction of the Interstate Commerce Commission to matters of primarily local concern, Con-

gress has, by implication, *amended* the Railway Labor Act—the fundamental charter of national policy for railway labor—and this although Congress on this occasion was in no way concerned with problems of labor relations in the industry. By negative implication Congress amended the Railway Labor Act so as to withdraw from the duty to bargain, imposed by that act, a subject of the utmost concern to railway labor—and this although the most elementary principles of representative government would have dictated that no such revolutionary change be attempted without full disclosure of the purpose and without fully hearing the interests to be affected. By negative implication Congress amended the Railway Labor Act not only so as to withdraw the duty to bargain concerning the proposed abolition of jobs, but so as to make it *unlawful* for a union representing railway employees to assert the right to bargain collectively concerning such problems. Hence, by a further negative implication, superimposed upon the first, Congress *amended* also the Norris-LaGuardia Act—that capstone of national policy concerning the intervention of courts into labor disputes.

Absurd as this statement of the argument necessarily is, the argument of the Railroad amounts to no more and no less. Concededly, what is involved in this case is a labor dispute. The Railroad therefore proceeds to evade the Norris-LaGuardia Act's denial of jurisdiction by contending that the labor dispute is unlawful. It seizes upon the notion that, by not extending the jurisdiction of the Interstate Commerce Commission to station closings, Congress established, by implication, an overriding national policy vesting complete control of such matters in state regulatory commissions, and excluding labor from any voice, through collective bargaining, in their resolution.

The argument assumes that railroad regulation is what it is not: that in each of the nine states concerned there

is an agency charged with initiating and effectuating an aggressive program for eliminating waste and increasing efficiency on the railroads and with authority to control labor costs. The Railroad well knows that this is not so and never has been so, although it makes that concession rather late (*Id.* 57) in an argument which tends to create the impression that Congress is overjoyed with the great job that the state agencies are doing in the matter of modernizing the railroads. The truth, of course, is that railroad regulation by the states is passive and permissive; the state initiates nothing.

"Managerial initiative necessarily underlies the system of largely permissive authority which is basic both to federal and state regulation. *Managements propose, and the commissions dispose.*" (*Id.* 57: Emphasis supplied.)

Thus the argument of the Railroad reduces to the proposition that the overriding national policy declared (by implication) by Congress is that prime responsibility for decisions relating to modernization, and to the effect of technological change upon job tenure, is vested in *management*, subject only to passive review and permissive approval by state regulatory commissions. In this process organized labor is to have no part; it is *illegal* for it to assert a right to participate through the established procedures of collective bargaining.

In effect, the Railroad's argument is that collective bargaining as to the abolition of jobs may result in increased labor costs which may, in the opinion of state commissions, be wasteful and hence collective bargaining cannot be permitted. This proposition runs counter to an historic and basic principle of rate regulation. The Interstate Commerce Commission and state regulatory bodies take labor costs as they find them, in the same way as costs of equipment, supplies, executive salaries and other costs.

Public Utility Commissions do not regulate wages any more than they regulate the prices of the commodities essential to the transportation industry. A classic statement of the position of Congress was made on this subject in the debates leading up to the enactment of the Railway Labor Act in 1926, by Congressman Barkley, in successfully opposing an amendment which was construed as giving the Interstate Commerce Commission authority in the matter of wages. He said:

“ \* \* \* if the public has a right to fix the compensation of men who labor on railroads merely because the public ultimately pays the bill in freight rates, which are only a small portion of ultimate prices, then, if we follow that logic to its conclusion, the public would have the same right to fix the compensation of men who labor in the industries which produce the freight to be carried in commerce; and this, in turn, would put the public, through the agencies of government, into the fixing of all costs and of all prices, because in the end the public must pay all this in the price of what it buys. This would ultimately mean Government operation of everything, which is unthinkable.” (67 Cong. Rec. 4519.)

The fact is that the entire argument relating to state regulatory authority is beside the point so far as the issue in this case is concerned. The issue here concerns the right to bargain collectively with respect to job abolitions. Who abolishes jobs? Not the commissions, but management. To be sure, management may have to get the permission of an agency established to safeguard the interests of the members of the public who use the railroads; but the agency does not abolish jobs. The entire argument depends for its success upon the creation of an illusion that an all-powerful state-national agency commands the railroad to abolish jobs, so that labor organizations have no voice in the matter. Nothing could be farther from the truth. If the railroad is “ordered” to abolish jobs (which

it is not, but only permitted)\* it is only because the railroad has pleaded that it be so commanded. There is not the slightest reason why the Railroad's resort to the commissions for authority to abandon positions should not be preceded and shaped by the process of collective bargaining. By the facile, self-serving formula, "Managements propose, and the commissions dispose", the Railroad seeks to read collective bargaining out of national policy whenever a labor dispute touches upon matters which management may submit to a state regulatory agency for approval.

The Interstate Commerce Commission, in an area in which it is given broad regulatory powers, has emphasized that its function is merely to "authorize or permit" the applicant carriers to enter into a proposed transaction: that it has no power even to compel a carrier to consummate a transaction authorized by the Commission; and that, even where it has power to impose duties as a condition of granting permission, that power is limited to the imposition of duties on the carrier, and does not extend to employees or organizations of employees. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease*, I. C. C. Finance Docket No. 19432 (May 5, 1958). The Commission had authorized North Western, coincidentally the respondent in this case, to lease the lines of the Chicago, St. Paul, M. & O. Ry. Co., to be integrated into the North Western system. Difficulties relating to seniority rights of employees were encountered in the process of integration, and North

\* Throughout this litigation the parties have disagreed as to the permissive or compulsory character of the orders of the state regulatory commissions. The Railroad now seems to concede that the orders are permissive only. (Resp. brief, pp. 56-57.) Lest there be further confusion, we cite here the pertinent portions of the record, which speaks for itself: *Action of the South Dakota Commission*: Findings 6, 7 and 8 (R. 192-193). Order (R. 194-95). Order denying Rehearing (R. 213-215, esp. 214-215). *Action of the Iowa Commission*: Order (R. 236-7.) Excerpts from Iowa Code 1958 (R. 242-43).

Western applied to the Commission for a supplementary order requiring "the parties" (i. e., the Railroad and certain unions) to undertake discussions for the purpose of effectuating the integration, and to report their progress to the Commission. In addition, the Railroad asked the Commission to declare that the parties were relieved of the "restraints, limitations and prohibitions" of Section 6 of the Railway Labor Act, pursuant to which mediation proceedings were in progress. All the requested relief was denied. The Commission said:

"\* \* \* Likewise under Section 5 of the [Interstate Commerce] Act we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction \* \* \*"

"Under section 5(2)(f) of the Act, we are *required* to impose upon the carriers in each approved transaction, conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything. Thus, North Western's request that we order such parties to negotiate and report back to us must be denied."

The Commission denied also the requested declaration that the Railroad was relieved of the restraints of the Railway Labor Act, stating that it had no authority to interpret section 5 (11) of the Interstate Commerce Act, on which the request was based, and adding:

"Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do." *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease*, I. C. C. Finance Docket No. 19432 (May 5, 1958).

There is absolutely no conflict between the proposed contract provision and state or national authority. The provision simply calls for the normal operation of collective bargaining with respect to proposals to abolish jobs which may be presented by management to the commissions. The Railroad's repeated characterizations of the contract proposal as vesting in the Union a "veto" power over job abolitions masks its persistent refusal to bargain about the proposal. Had the Railroad engaged in the normal processes of collective bargaining instead of vetoing the procedures of the Railway Labor Act, some modification of the contract proposal would in all likelihood have resulted. But assuming the Railroad had agreed to the contract proposal without modification, any Union would recognize the need for its sensible administration. Apart from the continuing character of the relationship which has implicit in it a give-and-take process, the Railroad is not without a remedy since it would have a right to institute elimination of the contract provision by the serving of a thirty-day notice at any time.\* This right is an effective check against arbitrary or unreasonable action.

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\* The agreement between the Railroad and the Union is not for a fixed period and is subject to change at any time by service of a Section 6 notice. (R. 161-2.) This fact underlies the basic fallacy in respondent's attack on the last sentence of Finding 17, the only finding challenged by it. (Resp. brief, p. 17.) This finding reads as follows:

"The proposed contract change incorporated in the Section 6 notice served by the defendant Telegraphers on December 23, 1957 relates to the length or term of employment as well as stabilization of employment. Collective bargaining as to the length or term of employment is commonplace. There are a variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical

The hollow core of the Railroad's entire argument is best revealed by the Railroad's own words:

"Congress did not intend to substitute economic warfare for regulation in this area of interstate commerce—to submit issues of this kind for determination by ordeal of battle rather than by the public authority provided for this purpose." (Resp. brief, p. 23.)

Substituting plain words for the expletives "economic warfare" and "ordeal by battle", we submit that what Congress did indeed clearly intend was to leave labor disputes such as this to be resolved by collective bargaining and the free play of economic forces, and not that they should be resolved by "managerial initiative" with the passive consent of state regulatory agencies in a process from which collective bargaining is excluded and labor has no voice.

to the rule proposed by the defendant Telegraphers are in existence on at least two railroads." (R. 356-7.)

The only point of difference between the Union's proposal and the contract provisions which formed the basis for the last sentence of the finding stated by the Railroad relates to the length of the proposed agreement. The Railroad states that the Seaboard Agreement (in effect for more than thirty years) is from year to year, the Yardmaster agreements are for a period of two years, but the contract proposal here involved would continue in perpetuity. Ignored in this statement is the right to serve a thirty-day notice of contract change at any time.

## III.

**THE DECISION OF THE COURT OF APPEALS CANNOT BE SUSTAINED ON THE GROUND THAT THE LABOR DISPUTE INVOLVED IS A "MINOR" DISPUTE.**

The confusion engendered by the Railroad surrounding this essentially simple point must be dispelled once and for all. This lawsuit began when the Railroad sought to enjoin a strike called as a consequence of its refusal to bargain concerning a Section 6 notice served by the Union seeking to amend their existing collective bargaining agreement.\* By shifting the discussion to a distinctly collateral agreement—the so-called moratorium clause of the National Mediation Agreement of November 1, 1956 (Art. VI, R. 263, 268-69), the Railroad attempts to convert the dispute into a minor dispute. The National Agreement was an industry-wide one, the purpose of which was to fix the general level of compensation for the duration of the period covered. The parties therefore agreed that during that period they would not serve Section 6 notices for the purpose of increasing or decreasing rates of pay, overtime payments, Sunday or holiday payments, medical benefits, and the like.\*\* But paragraph (c) of Article VI provided:

“This Article VI does not prevent the progressing of pending notices, the serving of notices and the nego-

\* The District Court held: “The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agreement on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on the plaintiff on December 23, 1957.” (Find. 19, R. 357.) This finding of fact has not been challenged. (Resp. brief, p. 17, n. 1.)

\*\* The moratorium period has now expired. The relevant provision of the National Agreement is: “This Agreement . . . shall remain in effect until October 31, 1959 and thereafter until changed or modified . . . except that notices may be served before the expiration of the three-year period, provided such notices do not contemplate effective dates earlier than November 1, 1959.” (Art. VIII, R. 269.)

tiation of agreements dealing with stabilization of employment, separation allowances or other matters not prohibited by the foregoing provisions of this Article VI." (R. 269.)

There is, of course, a wide difference between (a) the major labor dispute involved in this case, growing out of the refusal of the Railroad to bargain concerning a proposed contract change, and (b) the disagreement between the Railroad and the Union as to the applicability of Article VI. This case is in no sense one growing out of the difference concerning the applicability of Article VI. The attempt of the Railroad to characterize this case as one involving or growing out of a minor dispute depends for its success upon treating the major dispute, which is inescapably the genesis of the proposed strike and the litigation, as having been eliminated or absorbed by the disagreement as to the applicability of Article VI, and treating the latter as a grievance. The Railroad's purpose, of course, is to make it appear that the doctrine of the *Chicago River* case is applicable, and that this case would fall within an exception to the Norris-LaGuardia Act.

By its very nature, Article VI of the National Mediation Agreement is incapable of giving rise to grievances such as are referable to the Adjustment Board as minor disputes.\*

\* A minor dispute is one concerning the application or interpretation of a collective bargaining agreement—one which "contemplates the existence of a collective agreement already concluded, or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 723 (1945). Minor disputes are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 33 (1957). In the *Chicago River* case itself, there were involved "twenty-one grievances of members of the Brotherhood against the carrier. Nineteen of these were claims for additional compensation, one was a claim for reinstatement to a higher position, and one was for reinstatement in the employ of the carrier." 353 U. S., at 32. Minor disputes con-

It does not deal with terms and conditions of employment. It creates no rights in the employees against the employer. It simply regulates the subjects which the parties agree not to reopen during the life of the contract, and can serve only as an argument against the filing of certain Section 6 notices. Thus the only disputes it can give rise to are of necessity collateral issues in major disputes.

We propose to show (1) that the Railroad's contention that the Section 6 notice was barred by Article VI was a belated and opportunistic expedient; (2) that the contention that the Section 6 notice was barred by Article VI is without substance; (3) that the Railroad has not followed the procedure prescribed by law and by agreement of the parties for the resolution of questions of interpretation of the National Agreement; (4) that the question of interpretation has not been docketed, and is not pending for determination by the National Adjustment Board; and (5) that, even assuming that the Section 6 notice was barred by Article VI of the National Agreement, the fact remains that this lawsuit is one involving or growing out of a major labor dispute within the meaning of the Railway Labor Act and the Norris-LaGuardia Act.

When the Section 6 notice was served, the Railroad did not object that it was barred by Article VI. At no time during the period from December 23, 1957, when the Section 6 notice was served, through August 20, 1958, when the temporary restraining order was issued, did the Railroad make any reference to Article VI, either in its correspondence with the Union and the National Mediation Board, or in the various meetings with the National Medi-

*cern grievances*—complaints by the Union on behalf of individual employees or groups of employees, or by the individual employees concerning their rights under the bargaining agreement. They are disputes of a type for which compulsory arbitration is deemed appropriate, and for the settlement of which compulsory arbitration is the procedure prescribed by law.

ation Board, or in any of the discussions between Railroad and Union officials. On August 21, 1958, *the day after the temporary restraining order had been issued*, the Railroad wrote to the Union, asserting for the first time that the Section 6 notice was barred by Article VI. (Finding 13, R. 355.) The reason for this belated and opportunistic maneuver is not difficult to trace. In his argument on the application for the temporary restraining order counsel for the Railroad had argued that the dispute between the parties concerned only grievances of station agents in connection with the Central Agency Plan, and relied on the *Chicago River* case as removing such grievances from the ban of the Norris-LaGuardia Act. Counsel for the Union replied that even if the dispute could be regarded as a minor one, an important prerequisite to the applicability of the *Chicago River* doctrine was lacking: the matter had not been referred to the Adjustment Board. *Manion v. Kansas City Terminal Ry. Co.*, 353 U. S. 927 (1957). Plainly the Railroad felt that it must initiate some sort of proceeding before the Adjustment Board, and in desperation attempted to submit, not any question of grievance in connection with the Station Agency Plan, but the wholly different, peripheral and novel question of the interpretation of Article VI as to the propriety of the Section 6 notice. This was done abruptly, without any prior discussion with or notice to the Union. At the same time the Railroad amended its complaint, setting forth these new developments. On cross-examination Mr. Heineman, chairman of the railroad, testified:

"I do not believe that the carrier, at any time before the commencement of this lawsuit, asserted to the Order of Railroad Telegraphers that the proposal of December, 1957 was contrary to Article VI of the November 1, 1956, agreement." (R. 106.)

This without more should suffice to demonstrate that this case is not one concerning grievances, or a minor dispute concerning questions of interpretation relating to rates of pay, rules and working conditions. Since the issue has been so confused by respondent, however, we go farther.

The contention that the Section 6 notice was served in violation of Article VI, or even that there is a substantial question as to the interpretation of Article VI with respect to this notice, is without substance. The National Mediation Board, which as we shall show is the authority charged with interpreting the National Agreement, has issued an interpretation with reference to a group of Section 6 notices, one of which was identical with the notice served in this case, declaring:

"The portion of paragraph (e) reading: 'This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment \* \* \* permits the serving and progression of notices dealing with stabilization of employment. By being stated in a double negative form, it becomes an affirmative declaration of a right to so serve and progress proper notices dealing with such matters.'"

It accordingly ruled that the unions could progress all the notices so served under paragraph (e) of Article VI. *In re Applications of Brotherhood of Maintenance of Way Employees, Order of Railroad Telegraphers, and Employees' National Conference Committee for Interpretations*, Interpretations Nos. 72, 72(a), 72(b), National Mediation Board, January 14, 1959 p. 7.

Moreover, the Railroad completely disregarded the procedures prescribed by law and by the agreement of the parties for the interpretation of the National Mediation Agreement. Section 5, Second, of the Railway Labor Act provides:

"In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

The parties to the National Mediation Agreement reached a further understanding as to the procedure for interpretation:

"The Carriers' Conference Committees and the Employees' National Conference Committee have entered into an understanding that controversies over the meaning or application of the November 1, 1956 Agreement which are not settled on the individual properties will be referred to the Committees signatory to the Agreement for disposition . . . ."

"The understanding contemplates that if the Committees signatory to the Agreement are unable to resolve the question, such committees will then endeavor to agree upon a method for final disposition of the dispute. If the Committees can neither resolve the question, nor agree upon a method for final disposition, it has been agreed that Section 5, Second, of the Railway Labor Act will then be invoked." (R. 343-44.)

When the Railroad decided, after the temporary restraining order had been issued, to interject the contention that the case concerned a question of interpretation of Article VI of the National Mediation Agreement, it did not make an attempt to resolve that question on the individual property. It did not submit the question to the signatory committees in accordance with the understanding to which it was a party. It did not submit the question to the National Mediation Board at all. Instead, it purported to refer that question to the Adjustment Board, which has no jurisdic-

tion in the premises. A difference as to the interpretation of Article VI cannot possibly be brought within the terms of Section 3, First (i) of the Railway Labor Act.\* Article VI of the National Agreement does not relate to rates of pay, rules, or working conditions, and a difference as to its interpretation cannot give rise to a grievance. Section 3, First, of the Railway Labor Act is the basis for this Court's holding in the *Chicago River* case that minor disputes are subject to compulsory arbitration and that strikes in connection with them are removed from the ban of the Norris-LaGuardia Act. It should be abundantly clear that the question whether the Section 6 notice in this case was served in violation of Article VI has nothing to do with grievances, nor with interpretation of provisions relating to rates of pay, rules, and working conditions, and that the Adjustment Board has no jurisdiction.

Even if the procedure prescribed by Section 3, First (i) were applicable the Railroad did not follow it. There was no attempt whatever to "handle the dispute in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." There was no attempt to "reach an adjustment in this manner." (If it is difficult to see how these procedures apply to the disagreement over the interpretation of Article VI, that is because they were, of course, designed for employee grievances, and not for such totally different questions of inter-

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\* Section 3, First (i) of the Railway Labor Act provides: "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (45 U. S. C. § 153, First (i).)

pretation.) In testimony which has already been quoted in part, Mr. Heineman stated:

"I do not believe that the carrier at any time before the commencement of this lawsuit asserted to the Order of Railroad Telegraphers that the proposal of December, 1957, was contrary to Article VI of the November 1, 1956, agreement." (R. 106.) "• • • I believe I am familiar with the procedural requirements for the submission of disputes to a National Railroad Adjustment Board. I am familiar with the requirement of the statute that disputes referable to the Board shall be handled on the property in the regular manner up to and including the highest operating officer of the carrier.

"As to whether the dispute as to the applicability of Article VI of the 1956 Agreement to the December, 1957, proposal was ever so handled on the property, it is the position of the carrier that the communication of August 21 to the General Chairman, with copies to Mr. Leighty, was the statement of the position of the carrier with reference to that dispute before it left the property • • •" (R. 107.)

In other words, the dispute was not handled on the property at all. On the day after the temporary restraining order was issued, the Railroad simply invented the dispute and referred it immediately to the Board.\* The simple

\* Mr. Heineman conceded that "this may have been unusual in the lateness of the assertion of that position to the Telegraphers" (R. 107) and complained in justification that the strike notice was also "unusual." (R. 108.) But there is a vast difference between the procedure followed by the Union in calling the strike and that of the Railroad in referring this so-called "dispute" to the Adjustment Board. Before issuing the strike notice the Union had exhausted the processes of the Railway Labor Act. The process took many months and the Railroad was apprised of every step. The strike ballot was submitted to the Union membership on July 10, 1958, almost seven months after service of the Section 6 notice. The Railroad was aware that the ballot was being taken. (R. 95.) The strike call was not issued until August 18, more than five weeks after the ballot. In these circumstances it cannot be seriously maintained that the strike call came as a surprise to the Railroad, nor that it was an "unusual" action.

truth is that the Railroad made no effort to comply with the procedure for referring a dispute to the Adjustment Board, and offered no adequate explanation for its failure to do so.

Since the disagreement over the interpretation of Article VI is not the labor dispute which gave rise to this lawsuit, and since the National Mediation Board is the proper agency to which such disagreements should be referred, and the Adjustment Board is not, and since the Railroad did not follow the procedure for submitting disputes to the Adjustment Board in any event, the Railroad's current statement that the question of interpretation of the moratorium clause has been "formally submitted \* \* \* to the Adjustment Board, which has received and docketed the submission and where the issue is pending for determination" (Resp. brief, p. 65), is meaningless as well as irrelevant.\*

Finally, even if we assume, of course without conceding, that the Section 6 notice was served contrary to Article VI, that circumstance would not alter the fact that the present action is one involving or growing out of a major labor dispute. This Court can put a quick end to the constant shifting from one issue to another by asking the Railroad to answer forthrightly one simple question: Is the Railroad prepared to maintain that the issue between it and this Union, precipitated by the service of the

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\* It is also untrue in an important part. Long ago, at the trial in the District Court, Mr. Heineman corrected a statement he had made to the effect that the matter had been docketed: "I have been informed that that case was received and docketed by the Third Division. I may have been in error. I think my testimony went beyond the submission of the matter to the Adjustment Board. I believe I stated that we had received a letter indicating that it had been received. I think Exhibit 12 is the letter I was referring to. It does not refer to docketing." (R. 108, Exhibit 12, see R. 301.) As of this writing, to our knowledge, the matter has not been docketed and remains in the same posture as it was when the attempt to refer it to the Adjustment Board was first made.

Section 6 notice, as to whether the collective bargaining agreement between them shall be amended so as to provide that no position in existence on December 3, 1957 shall be abolished or discontinued except by agreement, is an issue for the settlement of which the law provides compulsory arbitration? If the answer is in the negative, the Railroad cannot possibly maintain that this action arises out of a minor dispute within the holding of the *Chicago River* case.

## IV.

**NONE OF THE QUESTIONS RAISED BY THE PETITION FOR CERTIORARI IS MOOT.**

The questions concerning the jurisdiction of the District Court to enter an injunction, pending appeal under the supposed authority of Rule 62(c), Federal Rules of Civil Procedure, and whether the Railway Labor Act withdraws the right to strike following termination of emergency services of the National Mediation Board, are not moot. The periods during which the temporary injunctive orders of the District Court were operative have expired. However, the Railroad was required to post, and did post, bonds as security both in connection with the temporary restraining order (which was issued on the theory that the Act withdraws the right to strike during a second thirty-day waiting period following termination of emergency mediation services) and in connection with the injunction pending appeal. The rights and duties of the parties arising out of the bonds are dependent upon whether the injunctive orders were properly issued.

Unlike *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, A.F.L.-CIO, et al. v. Missouri*, recently decided in this Court (28 L. W. 4095, Jan. 25, 1960) the labor dispute here involved has not been settled, no constitutional issue is at stake inhibiting decision by this Court, and affirmative relief on the bonds may be given against the Railroad in this proceeding. (Section 7, Norris-LaGuardia Act, 29 U. S. C. § 107.) The orders appealed from come within this Court's observation in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 515 (1911), that consideration of the validity of orders in suit "ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review." The recurring character of one of

the problems, the claimed second thirty-day period, is highlighted by the concern of the National Mediation Board (Memorandum, National Mediation Board, p. 7) and by *Pittsburgh & Lake Erie R. R. v. Brotherhood of Railroad Trainmen*, 45 L. R. R. M. 2313, 28 L. W. 2322 (W. D. Pa. December 14, 1959), which rejected the notion of a second thirty-day waiting period. This case was not decided until after our brief on the merits was filed. It is squarely in conflict on this issue with the decision of the District Court in the instant case, which was left undisturbed by the Court of Appeals. The appeal in the *Pittsburgh* case was dismissed on motion of both parties, prior to the expiration of the second thirty-day period, on December 30, 1959.

## V.

**EVEN APART FROM THE NORRIS-LAGUARDIA ACT, THE DISTRICT COURT LACKED JURISDICTION.**

The Railroad's argument as to the existence of federal-question jurisdiction reduces to the proposition that the Railroad can create jurisdiction by asserting its existence. The Railroad points to no federally based right to the injunction which it seeks in this case.

At best, the Railroad's current position is that its right to an injunction derives from the action of some state commissions which the national government has allowed to act in this area of regulation of interstate commerce. The inadequacy of the argument on the merits has already been established. Even if the argument had merit, however, it would only serve to bring the case squarely within the holding of this Court in *Gully v. First National Bank*, 299 U. S. 109 (1936), that no federal question is, thus presented. There, too, the right asserted was based on State law which controlled only because Congress had permitted the State to act. This delegation, or withholding, of federal power, cannot give rise to federal-question jurisdiction:

"We recur to the test announced in *Puerto Rico v. Ryssell & Co.*, 288 U. S. 476, 483 \* \* \*: 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nash-*

*ville R. Co. v. Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby." 299 U. S. at 116.

There is no basis for the assertion of federal jurisdiction in this case. The Railroad has shown no federal law which authorizes the issuance of the injunction. And we repeat that this Court, in *Trainmen v. Chicago River & Indiana R. R.*, 353 U. S. 30 (1957), was not asked to pass on this question of federal jurisdiction, nor did it purport to do so.

### CONCLUSION.

The Railroad dwells at length on the damages that would befall it and the public if a strike took place. We do not doubt the Railroad would suffer adverse consequences. As to the Railroad's claims of the "seriousness of interruption to interstate commerce, and the consequent adverse effect on the public" (Resp. brief, p. 2) the Railway Labor Act places responsibility in this area upon the Mediation Board and the President and not upon the courts (Section 10, Railway Labor Act, 45 U. S. C. § 160), and they did not choose to act in advance of the strike date. Nor do we quarrel with the proposition quoted on pages 61 and 62 of the Respondent's brief that "*Congress* at different times and for different purposes may gauge the demands of 'prevailing economic conditions' differently or with reference to considerations outside merely 'economic conditions'." (Emphasis added.) But we submit that until Congress has acted, neither the courts nor the Railroad can destroy the protections afforded by the Norris-LaGuardia Act.

Respectfully submitted.

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February 15, 1960.

SUPREME COURT. U. S.

United States Supreme Court, U.S.

FILED

MAY 2 1960

JAMES R. BROWNING, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

**No. 100**

THE ORDER OF RAILROAD TELEGRAPHERS,  
A VOLUNTARY ASSOCIATION, ET AL.,  
*Petitioners,*

*vs.*

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, A CORPORATION,  
*Respondent.*

**PETITION FOR REHEARING.**

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*Respondent.*

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**PETITION FOR REHEARING.**

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North Western, pursuant to Rule 58, hereby petitions for rehearing of this Court's decision of April 18, 1960.

**I.**

The opinion of the Court says that the "main question in this case" is whether the Norris-LaGuardia Act bars an injunction; and then promptly purports to find the answer within the four corners of that statute. It concludes that "(U)nless the literal language of (Norris-LaGuardia) is to be ignored, it squarely covers this controversy." But, as pointed out by an objective source, "(T)he plain language of Norris-LaGuardia is generally violated if a labor injunction is issued. • • •" And yet this Court has repeatedly upheld injunctions, the literal

prohibitions of Norris-LaGuardia notwithstanding, in those cases where the Court has found a "repugnance of the union objectives to a federal policy implied from judicial construction of the Railway Labor Act." Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958).

Whether or not Norris-LaGuardia applies is, accordingly, a description of the result of the decisional process in this case, and not of "the main question" to be decided. North Western has freely conceded in every court throughout this litigation that, if the contract demand made by the ORT was to be deemed a proper one under the Railway Labor Act, then Norris-LaGuardia clearly applied. The true question in the case is, thus, whether the union demand is within the range of congressional contemplation under the Railway Labor Act. That question can be answered only by looking to the words of the Railway Labor Act, construed in the light of any relevant keys to the congressional intent underlying them. Summarily to dispose of this case by reference to Norris-LaGuardia is so patent a misapprehension of the issue here as to warrant this request for reconsideration.

The opinion of the Court nowhere expressly rejects—and, indeed, it appears to recognize—that an unauthorized demand under the Railway Labor Act cannot be made the basis of a strike free of judicial interdiction under Norris-LaGuardia. It could not do otherwise without now taking the position that the union demand in the *Howard* case that the railroad, on pain of strike, enter into a contract abolishing a classification of jobs held by Negroes not represented by the union, was a proper one. North Western does not understand that the Court now so intends to hold.

Justice Black also wrote for the Court in *Howard*. There he disposed of Norris-LaGuardia in an almost parenthetical aside. Here he characterizes it as "the main question"

and looks to its literal terms as the guide for decision. Distinguishable as the facts in the two cases may be, why this difference in method? Perhaps the explanation is to be found in the statement in the Court's opinion that "(I)t would stretch credulity too far to say that the Railway Labor Act, *designed to protect railroad workers*, was somehow violated by the union acting precisely in accordance with *that act's purpose to obtain stability and permanence in employment for workers.*"\*

The primary purpose and design of Congress in the Railway Labor Act has, however, previously been identified by this Court in somewhat different terms:

"It was for Congress to make the choice of the means by which *its objective of securing the uninterrupted service of interstate railroads was to be secured* \* \* \*." *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 553 (1937).

Indeed, in expressing its purposes at the very outset of Section 2 of the Act, Congress said:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein \* \* \*."

To suggest at this late date that the Railway Labor Act has no purpose other than to further the interests of one private segment of our economy is to pervert the meaning of this statute and heedlessly to invite the very disruption of commerce which Congress sought to avoid. That the so-called "labor" statutes are not passed by Congress solely for the benefit of labor unions was recognized by Mr. Justice Harlan, writing for the Court one week after this case was decided:

"\* \* \* It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails

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\*Emphasis is supplied throughout.

the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. It may be asserted, without fear or contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in 'industrial peace which it is the over-all purpose of the Act to secure.' *Labor Board v. Childs Co.*, 195 F. 2d 617, 621-622 (concurring opinion of L. Hand, J.) • • • •

*Local Lodge No. 1424 v. NLRB*, No. 44, October Term, 1959, decided April 25, 1960.

The question thus remains: Was the ORT's demand for a veto power, on this record, within the range of congressional authorization under Section 6 of the Railway Labor Act? Although it had already reached decision by reference to *Norris-LaGuardia*, the Court does eventually say that it thinks this demand to be a proper one. It seems to accomplish this, however, by the device of characterizing the demand as something other than it really was. For example, Justice Black says that he can find nothing which has the effect of "making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs." In almost the next breath, he says "(T)he union merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations or to seek permission to abandon stations and thus abolish jobs." And he concludes this unrealistic description of the demand by the statement that "(N)othing the union requested would require the railroad to violate any valid law or the valid order of any public agency."

The Court thus refuses to accept the ORT demand for what it was, namely, an unqualified veto power over the discontinuance of positions. The ORT was expressly not seeking simply the opportunity of discussing or consulting with North Western about job discontinuances, nor was it interested in simply a contractual right to bargain about them. It was seeking a veto; and, in response to questions from the bench during oral argument, counsel for the ORT made it clear that the veto power sought through contract would, in the opinion and purpose of the ORT, prevail as against valid regulatory orders necessitating job discontinuances in the public interest.

The Court, noting this contention of the ORT, says that "(W)hether this contention is valid or not we need not decide since there is no such conflict before us." The question is not whether that conflict is now actually before the Court. That kind of conflict could only arise *after* a railroad has been forced on pain of strike to enter into a contract of the kind here demanded by the ORT. The question is, rather, whether Congress intended that a railroad could legally be called upon to enter into such a contract, with the potential it clearly possesses for frustration of the regulatory process. In gauging the intention of Congress in this regard, the Court should at least characterize the demand accurately, for obviously the exact nature, purpose and effect of the demand, especially in relation to the regulatory process, would be critical elements in congressional appraisal of it. How, therefore, can the Court say that it need not express an opinion on this question, if it is to make a determination of congressional intent which is at all meaningful?

Moreover, the question is directly presented here and now. If the North Western were to acquiesce under strike pressure in the ORT's demand—what then? Could and should it, as a matter of open and forthright dealing with its em-

ployees, agree on one day to a contract saying that no position in existence on December 3, 1957 will be abolished or discontinued except by agreement with the union, and then say the next day that its agreement is unlawful and does not apply to ~~ORT members expressly covered by regulatory orders?~~

The range of congressional contemplation of the scope of bargaining under the Railway Labor Act has, as this Court has repeatedly recognized, lines of demarcation which turn on such things as a generalized repugnance to public policy of efforts by a union, as in the *Howard* case, to get jobs for their own members which were held by Negroes. North Western asserts a like repugnance in this effort by the ORT to substitute itself for the duly constituted regulatory agencies in the determination of the public interest. The answer to this question is not, any more than in *Howard*, to be found in the Norris-LaGuardia Act, but in the Railway Labor Act, construed in the light of other congressional enactments with respect to interstate transportation relevant to the ascertainment of congressional intent. This is a rigorous and difficult process at best. It is not helped by the curious aversion the Court's opinion has for accurate characterization of the ORT's demand.

Equally curious is the Court's statement that "(I)t is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large." This statement is the capstone of a discussion of protective conditions and other devices designed to cushion the economic impact upon the individual of a job discontinuance found to be in the public interest. The inference is that North Western has made this archaic argument. This is an unfair inference from a record which showed a persist-

ent, albeit unsuccessful, effort by North Western to interest the ORT leadership in plans to provide for displaced employees. The only "collective voice" which has been silenced is that of the public, speaking through the regulatory process.

## II.

A second reason for rehearing relates to the use made by the Court of the findings of fact by the District Court, the precise nature and significance of which the Court seems to have mistaken.\* In the Court of Appeals, the ORT's brief there asserted that North Western's failure to attack the findings was dispositive of the appeal. In its reply brief, North Western dealt with each of the findings of fact. It pointed out that, of the 21 findings in all, Findings 1 through 16 were acceptable. Then North Western dealt in detail with the five remaining findings, two of which are now referred to in the opinion of the Court as of significance with reference to the decision reached.

The Court says " \* \* \* in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that 'collective bargaining as to the length or term of employment is commonplace,' is not challenged." The finding referred to is only a part of Finding 17, which reads in whole as follows:

"17. The proposed contract change incorporated in the Section 6 notice served by the defendant Telegraphers on December 23, 1957 relates to the length or term of employment as well as stabilization of employment. Collective bargaining as to the length or term of employment is commonplace. There are a

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\* After the oral argument, counsel joined in supplying to the Court (a) North Western's proposed findings of fact, (b) the transcript of the proceedings at the time the District Court made its findings, and (c) the briefs in the Court of Appeals.

variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads."

In the Court of Appeals, North Western noted that it had excepted to this finding as conclusory in character, especially insofar as the first two sentences are equated with a demand for a veto power over the discontinuance of jobs. The third and fourth sentences are unexceptionable, of course. North Western excepted vigorously to the last sentence, because the contracts introduced into the record, upon which this sentence was based, were not, "substantially identical" with the veto power here demanded. In its brief in this Court, North Western noted that this alleged finding of fact, as distinct from the legal or otherwise conclusory findings contained under the label of findings of fact, was the only one that was inherently untrue. It is clear, therefore, that North Western has not left unchallenged any so-called finding of fact which purports to find that a veto power over job discontinuances is a commonplace aspect of present-day bargaining, either in the railroad industry or elsewhere. Neither in the record, nor in its 60-page foray outside the record, was the ORT able to come up with a single example of a comparable veto power. If the Court in terms assumes something to be commonplace which actually is novel in the extreme, surely reconsideration is in order.

The other finding which the Court weaves into its argument is Finding 19:

"19. The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agree-

ment on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on the plaintiff on December 23, 1957."

~~This finding was excepted to by North Western but, taken on its face, it simply says that, if the ORT had not made this demand, there would have been no proposed strike. It concludes nothing on—indeed, it simply poses—the issue of whether the proposed demand was a proper one under the Railway Labor Act.~~

In conjunction with its reference to this finding, the Court appears to attribute significance to the rejection by the District Court of North Western's proposed finding that the ORT's demand was directed in purpose and effect against the implementation of the Central Agency Plan pursuant to regulatory authority. But, as the transcript submitted after argument shows, the District Judge rejected North Western's findings not because he found them untrue or unsupported by evidence, but only because he deemed them irrelevant or immaterial to his theory of the case.

### CONCLUSION.

Rehearing of the decision of April 18, 1960, should be granted.

Respectfully submitted;

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**CERTIFICATE OF COUNSEL.**

I hereby certify that the foregoing petition for rehearing  
is presented in good faith and not for delay.

.....  
*Counsel for Respondent.*

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No. 100

SUPREME COURT. U. S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1959

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**THE ORDER OF RAILROAD TELEGRAPHERS, et al.,**  
*Petitioners,*

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY,**

*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

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**MOTION OF BUREAU OF INFORMATION OF THE  
EASTERN RAILWAYS, THE ASSOCIATION OF  
WESTERN RAILWAYS, AND BUREAU OF INFOR-  
MATION OF THE SOUTHEASTERN RAILWAYS FOR  
LEAVE TO FILE BRIEF IN SUPPORT OF PETITION  
FOR REHEARING**

---

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No. 100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

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THE ORDER OF RAILROAD TELEGRAPHERS, et al.,  
*Petitioners,*

*vs.*

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY,

*Respondent.*

---

On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

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**MOTION OF BUREAU OF INFORMATION OF THE  
EASTERN RAILWAYS, THE ASSOCIATION OF  
WESTERN RAILWAYS, AND BUREAU OF INFOR-  
MATION OF THE SOUTHEASTERN RAILWAYS FOR  
LEAVE TO FILE BRIEF IN SUPPORT OF PETITION  
FOR REHEARING**

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The Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways move this Court for leave to file the attached brief as *amici curiae* in support of the petition for rehearing. Although both parties consented to the filing of a brief on the merits by these *amici*, and although the Railway Labor Executives' Association filed briefs both on the merits and in support of the petition for certiorari in this cause, petitioners refused to consent to the filing of the present brief. The interest of

the *amici* Bureaus in the questions raised by this case was set forth in their brief on the merits at pages 2-3. The far-reaching implications of the majority's opinion rendered on April 18, 1960, raise additional issues as to the application of the National Transportation Policy by state and federal regulatory commissions and as to the relationship between public regulation and collective bargaining in the transportation industry.

The majority opinion poses questions of vital importance not only to respondent but also to the railroads represented by these *amici*. It is in the public interest to maintain industrial peace in the transportation field. Yet the opinion herein, unless modified, will foster a rash of extreme demands that will breed strikes financed by all the railroads under the Railroad Unemployment Insurance Account.

For the reasons expressed herein and in the brief on the merits of these Bureaus, this motion for leave to file a brief *amici curiae* in support of respondent's petition for rehearing should be granted.

Respectfully submitted,

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formation of the Southeastern Railways.*

No. 100

IN THE  
SUPREME COURT OF THE UNITED STATES

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**BRIEF IN SUPPORT OF PETITION FOR REHEARING**

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It would appear from the opinion in this case that the Court misconceived the purpose and effect of the petitioners' demand. *Amici* Bureaus respectfully submit that the Court was in serious error in thinking that "The employment of many of these station agents inescapably hangs on the number of railroad stations that will either be completely abandoned or consolidated with other stations" (slip op. p. 6). The strike called by petitioners was not necessary to prevent loss of employment by any employee of the respondent. The petitioners' demand had to do with the abolition of *positions*, not with the "permanency" or "term of employment" of any of respondents' employees. The distinction is a crucial one. For example, in the pro-

posed merger between the Erie and the Delaware Lackawanna & Western Railroads, which is now pending before the Interstate Commerce Commission, the Railway Labor Executives' Association ("RLEA") has pointed out that although 1,982 positions will be abolished as a result of the merger, so many vacancies will be created by attrition that very few, if any, employees will be left without work to do. See Brief of RLEA (I.C.C. Finance Docket No. 20707, pp. 35-37, November 23, 1959.) In the present case the relationship between abolition of positions under the Central Agency Plan and loss of employment is comparably remote.

Moreover, respondent has offered to negotiate on the subject of lay-offs (R. 158), which alone controls the permanency or term of employment of employees represented by petitioners. If petitioners had been willing to negotiate on this subject pursuant to their duty to bargain about "rates of pay, rules, and working conditions", an agreement might have been reached curtailing any lay-offs as a result of the Central Agency Plan. Therefore, the Plan would not "necessarily result in loss of jobs for some of the station agents and telegraphers, members of the petitioner union" (slip op. p. 2). Under the Court's decision, on the other hand, railroad labor organizations can strike not only to prevent employees who are working 12 minutes a day from being discharged, but they also can insist that such employees be kept in the same positions and that when they die the carrier must find others to do the same job in perpetuity!

Even if a carrier must bargain about and suffer strikes over the abolition of positions as distinguished from the term of employment of employees, does this principle apply when the positions involved are affected with a public interest and their existence is subject to regulation by a

public agency? The majority opinion intimates that respondent's refusal to bargain was wrong because it was not limited to agents' positions in states where the Central Agency Plan had been approved (note 16, slip op. p. 10). Contrary to the opinion below, the majority apparently assumes that the petitioners' demand was not inspired by the state commission proceedings (slip op. p. 11). But whatever the motives, petitioners' demand was certainly not limited to positions other than those involved in the state-approved Plan. Did the Court mean that the North Western can refuse to bargain over the positions at issue in the state commission proceedings provided that it negotiates over the abolition of other positions? A clarification of the Court's holding is necessary not only to guide the parties to this dispute in their bargaining upon remand but also for the entire transportation industry. The Court's decision has already inspired labor organizations to submit similar demands on other carriers, and *amici curiae* anticipate a flood of such demands in the near future.

In this connection, *amici curiae* agree that "fair terms and conditions of railroad employment are essential to a well-functioning transportation system" (slip op. pp. 6-7) which the national transportation policy seeks to achieve. But the interests of employees constitute only one of the factors to be considered under that policy. For example, in passing on applications for mergers the "interest of the carrier employees affected" is just one of the four considerations the Interstate Commerce Commission must weigh under Section 5(2)(c) of the Interstate Commerce Act (49 USC §5(2)(c)). In *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, this Court just a few months ago held that the Commission should not give single-minded consideration to the antitrust policies of Congress but rather "the problem is one of accommodation" which will

"assist in effectuating the over-all transportation policy." 361 U.S. at p. 186. Did the Court in the present case mean to hold that when employees' interests are involved, the Commission's task is not one of accommodation but rather a single-minded adherence to the interests of labor? The RLEA has so construed the Court's opinion, for they have already seized upon it as support for the job freeze they seek to have the Commission impose in the Erie merger. See RLEA Exceptions to the Recommended Report and Order of Examiner Hyman J. Blond (I.C.C. Finance Docket No. 20707, pp. 5-7, April 26, 1960). In any event, any accommodation of competing interests by the Commission is altogether meaningless if labor organizations acting exclusively in the interest of their members are free to veto mergers or abandonments which have been considered and approved by a public agency. One of the factors weighed by the Commission in the *Minneapolis & St. Louis* case was the effect of the various applications on employees. 361 U.S. at p. 193. If the Commission had concluded that the other statutory considerations necessitated approval of the Minneapolis & St. Louis Railroad's application despite the adverse effect on employees, could the employees of the Toledo, Peoria and Western have called a strike to force the carrier to accept the application of the Santa Fe and Pennsylvania?

Even if the "interest of the carrier-employees" were the only relevant consideration under the National Transportation Policy, the ultimate determination (1) whether a consolidation or abandonment should be approved and (2) what conditions on the approval should be imposed to protect employees, rests with a public agency rather than with labor organizations or carriers. Sections 5(2)(c) and (f) of the Interstate Commerce Act and *Interstate Commerce Commission v. Railway Labor Executives' Associa-*

tion, 315 U.S. 373, cited by the Court, do not support its statement that "the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which railroads may or must negotiate and bargain collectively" (slip op. p. 8). The cited examples in fact *narrowed* the scope of collective bargaining unless the Court meant to hold that a carrier may or must bargain collectively over conditions imposed by the Interstate Commerce Commission for the protection of employees affected by an abandonment or consolidation. The 1936 Washington Agreement providing severance pay for displaced employees which the Court also cites as an example of collective bargaining has been largely superseded by the Commission's practice of ordering carriers to give greater benefits to employees than those provided by the agreement. Carriers have heretofore assumed that they (and their employees) could be compelled to accept the conditions imposed by the Commission without further bargaining on the matter. If, however, disagreements over the effectuation of consolidations and abandonments or over employees' protective conditions constitute "labor disputes" under the Norris-La Guardia Act, it would seem that Commission orders on the subject are no longer enforceable. The Norris-La Guardia Act was not intended as a "one-way" street, and it limits injunctions against employers as well as employees in disputes to which it applies. See S. Rep. No. 163, 72nd Cong., 1st sess., p. 19 (1932). *Amici curiae* believe that the opening of abandonments and consolidations to unrestrained economic warfare is contrary to Congress' intention that they should be regulated in the public interest, and will lead to frequent disruptions to transportation contrary to the stated purpose of the Railway Labor Act and to the past practice of labor and management to let these issues be resolved by the appropriate agency.

*Amici curiae* of course recognize that "added railroad expenditures for employees cannot always be classified as 'wasteful'" (slip op. p. 12). But this Court is not called upon to decide whether or not the increased expenditures necessitated by petitioners' demand would be "wasteful." That issue has already been decided by the state regulatory commissions entrusted with jurisdiction over station agencies by Congress. *Amici curiae* contend only that these commissions rather than the Order of Railroad Telegraphers constitute the appropriate forum for resolving the issue. Alternatively, if the Telegraphers are given the power to decide whether or not station agencies should be abandoned, they have an obligation to consider the general public as well as the interests of the employees they represent. *Brotherhood of Trainmen v. Howard*, 343 U.S. 768. The record shows that they did not do so in the present case.

In conclusion, a rehearing should be granted because the majority misunderstood the effect and purpose of the petitioners' demand. A clarification of the Court's opinion on the proper relationship between collective bargaining and public regulation of the transportation industry is also necessary. The importance of the issues involved in this case to labor and management and public agencies is shown by the appearance of numerous organizations, as *amici curiae*. The public concern is also demonstrated by the widespread adverse editorial comment that the decision has evoked. The result reached should be reconsidered upon reargument. Cf. *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661.

**CONCLUSION**

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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